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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

MARGARET BORING,
Petitioner,

v.

THE BUNCOMBE COUNTY BOARD OF EDUCATION, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Do public school officials have absolute authority, notwithstanding the First Amendment, to discipline a teacher because of objections to ideas expressed in curricular materials she selected, regardless of the reasons for the objections and regardless of whether the teacher had notice that her use of such materials might be considered improper?

PARTIES

PETITIONER

Margaret Boring

RESPONDENTS

The Buncombe County Board of Education
Charles Johnson, Chairman
Michael Anders
Terry Roberson
Bruce Goforth
Bill Williams
Grace Brazil
Wendell Begley
in their official capacity as members of the Board of Education
Dr. J. Frank Yeager, Superintendent
Fred Ivey, Principal
in their individual and official capacities

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Margaret Boring prays that a writ of certiorari issue to review the *en banc* decision of the United States Court of Appeals for the Fourth Circuit entered in this case on February 13, 1998.

OPINIONS BELOW

The Fourth Circuit's *en banc* opinion is reported at 136 F.3d 364 (4th Cir. 1998), and is reprinted in the Appendix to this Petition ("App.") at 1a-33a. The panel opinion is reported at 98 F.3d 1474 (4th Cir. 1996), and is reprinted at App. 34a-65a. The opinion of the District Court for the Western District of North Carolina is unreported and is reprinted at App. 66a-78a.

JURISDICTION

The *en banc* opinion of the Court of Appeals was issued on February 13, 1998. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part as follows: "Congress shall make no law . . . abridging the freedom of speech."

The Fourteenth Amendment to the United States Constitution provides in pertinent part as follows: "No State . . . shall . . . deprive any person of life, liberty, or property without due process of law."

STATEMENT OF THE CASE

A. Factual Background

Petitioner Margaret Boring was a teacher at the Charles D. Owen High School in the Buncombe County, North Carolina School District. App. 81a. In the fall of 1991, she selected the play "Independence" for four students in her advanced drama class to present in the annual statewide high school drama competition. App. 81a-82a. The critically acclaimed play, by noted playwright Lee Blessing, depicts the dynamics within a dysfunctional single-parent family—a divorced mother and her three daughters, one of whom is a lesbian and another of whom is pregnant with an illegitimate child. *Id.*

At the time Boring selected "Independence," Owen High School had a "controversial materials" policy, which generally required advance parental approval of controversial materials. *Id.* at 85a. The policy did not cover dramatic presentations; but Boring nevertheless notified the parents of the four student actresses of the play's contents, and those parents approved their daughters' participation in the play. *Id.* Boring also notified the principal of Owen High School, Fred Ivey, that she had selected "Independence" as the play to be performed in the competition, and he did not object. *Id.* at 82a. Boring therefore proceeded to produce the play.

After the play had been presented at the regional level of the statewide competition, where it won seventeen of

the twenty-one possible regional awards, Donna Wyles, another teacher at Owen High School, asked Boring to present the play for one of Wyles' English classes. App. 82a. Boring agreed to the request, but she advised Wyles that the play contained mature themes and asked Wyles to obtain consents from the parents of her students prior to the staging of the play. *Id.* at 82a-83a. Wyles thereupon distributed consent forms to her students, and the play then was performed. *Id.* at 83a.

A controversy developed after one student in Wyles' class described the play to a parent, who in turn called Principal Ivey to complain. App. 83a. After receiving this complaint and reading the script of the play, Ivey told Boring that the students could not present the play in the next and final round of the statewide competition. *Id.* When the parents of Boring's students objected to that decision, Ivey agreed to allow the play to be presented if certain portions were deleted. *Id.* The play, as so modified, was then performed at the state finals, and it won second place. *Id.*

At the end of the 1991-92 school year, Ivey asked the Superintendent of Schools to transfer Boring from Owen High School, where she had taught advanced drama for thirteen years and had built a nationally-recognized drama program, to a junior high school, where she no longer would be able to teach advanced drama. App. 85a. The Superintendent granted the request, stating in purported justification of the transfer that Boring had failed to follow the school system's controversial materials policy in producing "Independence." *Id.*

Boring appealed the proposed transfer to the Board of Education. Prior to the Board hearing, there was considerable public discussion of the transfer, including accusations that Boring was "immoral" for having produced the play. App. 86a. The Board rejected Boring's appeal, *id.* at 87a, and this lawsuit followed.

In addition to setting forth the facts described above indicating that Boring had obtained consent from both the Principal and the students' parents before producing "Independence," the complaint specifically alleged that Boring did not violate the controversial materials policy and that the school authorities did not transfer her based on a genuine belief that she had violated that policy. App. 85a. Rather, the complaint alleged, they transferred her "in bad faith and with malice toward Plaintiff over the ideas expressed in the play." *Id.* at 85a, 87a.

B. Proceedings Below

The district court dismissed the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. A panel of the Fourth Circuit reversed in a 2-1 decision. The court of appeals, sitting *en banc*, reversed the panel by a 7-6 majority and affirmed the district court's decision to dismiss the complaint.

1. The District Court Opinion

The district court held that, because Boring's production of "Independence" took place in the context of curricular activities, defendants could discipline her if their action was "reasonably related to legitimate pedagogical concerns." App. 74a (quoting *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 273 (1988)). The court then declared that the defendants passed that test, without explaining how the court could make such a determination from the face of the complaint. App. 75a.[1]

2. The Panel Opinion

A panel of the Fourth Circuit reversed the district court by a 2-1 majority in an opinion authored by Judge Motz.

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[1] The district court also held that Boring's selection and production of "Independence" did not constitute "speech" within the meaning of the First Amendment. App. 73a. However, no judge of the Court of Appeals embraced that holding, and we do not address it further.

Noting that there is not "a single instance in which any court has applied *Hazelwood* to dismiss a teacher's complaint for failure to state a claim," and that, instead, "courts have required school administrators to establish their legitimate pedagogical concerns either by affidavit or at trial," App. 42a, the panel held that the district court had erred in dismissing the complaint in this case. App. 43a. "Without any basis for determining the defendants' intent in transferring Boring, other than Boring's allegation that it was done 'in bad faith and with malice toward [her] over the ideas expressed in the play,' the district court should not have dismissed the complaint on the theory that the asserted restriction necessarily related to legitimate pedagogical concerns." *Id.*

The panel went on to reject defendants' argument that the district court's decision could be sustained on an alternative ground, *viz*, that, where curricular matters are involved, a teacher's speech never can satisfy the "public concern" requirement of *Connick v. Myers*, 461 U.S. 138 (1983). The panel explained that *Connick*'s holding denies First Amendment protection to speech on matters that are solely of *personal* interest to a government employee, but that speech about matters of *public* concern does not become unprotected merely because it is undertaken in the performance of an employee's job duties. App. 45a. The panel added that, "in view of the importance of the free exchange of ideas in educating our society," the interpretation of *Connick* advanced by the defendants "would be particularly ill-advised when the employee is a teacher." *Id.* Canvassing this Court's decisions on the subject, the panel concluded:

> A fair reading of the relevant case law leads us to conclude that the question is not, and never has been, *whether* teachers have First Amendment rights in the classroom, but *how much* school authorities can legitimately restrict those rights. Striking a balance between the school's role as ultimate arbiter of the school curriculum and the teacher's limited in-class

> speech rights obviously presents a challenge. We believe the approach set forth in *Hazelwood*, of requiring school authorities to provide a legitimate pedagogical basis for in-class speech restriction, provides the best means of navigating this challenge.

App. 49a.

Because the panel held that the complaint had been improperly dismissed for the reasons discussed, the panel did not find it necessary to reach the merits of Boring's contention that the complaint also stated a claim on the alternative theory that the school authorities had failed to provide her with proper notice that she could be disciplined for producing "Independence". App. 52a. The court did, however, observe that "some notice would appear necessary to ensure that secondary school teachers' limited First Amendment rights have breathing space to survive." *Id.*

3. *The* En Banc *Opinion*

By a 7-6 majority, the Fourth Circuit, sitting *en banc*, vacated the panel decision and affirmed the district court. The opinion for the court, written by Judge Widener, held that it was appropriate for the district court to have granted the motion to dismiss, because all that the court needed to know to decide this case was that Boring's speech was communicated as part of her *curricular* duties. App. 9a, 11a. As Judge Widener saw it, both *Connick* and *Hazelwood* dictated the conclusion that such speech was not entitled to any First Amendment protection.

Connick, according to Judge Widener, stands for the proposition that speech by a teacher that involves part of the curriculum "does not present a matter of public concern" under any set of circumstances, but presents "nothing more than an ordinary employment dispute." App. 7a. And *Hazelwood*, according to Judge Widener, stands for the proposition that *any* decision by school officials that relates to the curriculum "is *by definition* a

legitimate pedagogical concern." App. 11a (emphasis added).

Judge Widener then turned to Boring's contention that, at a minimum, the First Amendment requires that a teacher not be subjected to discipline because of opposition to ideas expressed in curricular materials she has selected if the teacher had no notice that her use of such materials might be considered impermissible. His reasoning on that point consisted solely of the following sentence: "Plaintiff's contention that she was not given notice as to what was being proscribed is, of course, without merit, the plaintiff having no First Amendment right to participate in the makeup of the curriculum." App. 13a n.2.

Judge Luttig joined the majority opinion, but also filed a separate concurring opinion in which he took a somewhat different route to arrive at the same conclusion, *viz*, that teachers have no First Amendment rights with respect to their curricular speech. Noting that *Hazelwood* involved student speech, Judge Luttig rejected the view that the *Hazelwood* test should apply to speech by teachers. App. 17a-18a. Stating that "the analogy would seem to be pure between a teacher who, *qua* teacher, attempts to assert her own views through the curriculum itself, and any other public employee who, *qua* employee, attempts to assert her personal views through the official policies and decisions of her office," Judge Luttig concluded that curricular speech enjoys no protection under *Connick*. App. 16a.

Chief Judge Wilkinson, in a brief concurrence, stated that he, too, was opposed to the use of the *Hazelwood* test, because he found the phrase "legitimate pedagogical concern" to be too "loose, slippery, [and] litigious" to "consign . . . to the mercies of the federal courts." App. 14a.

Judge Motz dissented in an opinion joined by five other judges, in which she restated and expanded on the views

set forth in her original panel majority opinion. App. 22a-33a. Judge Motz pointed out that, although *Hazelwood* involved speech by students rather than by teachers, Judge Widener's conclusion that all decisions relating to curriculum are by definition "reasonably related to legitimate pedagogical concerns" is inconsistent with *Hazelwood*. As Judge Motz observed, this Court recognized that the student newspaper at issue in *Hazelwood* was "part of the educational curriculum," *see* 484 U.S. at 268, 271, and this Court nevertheless held that the actions of school authorities in restricting the content of the newspaper could be upheld only "*so long as* their actions are reasonably related to *legitimate* pedagogical concerns." *Id.* at 273 (emphasis added). *See* App. 25a.

As to the relevance and interpretation of *Connick*, the dissent noted that, "[a]lthough Boring's in-class speech does not itself constitute pure public debate, obviously it does 'relate to' matters of overwhelming public concern—family life, divorce, motherhood, and illegitimacy, among others." App. 29a.

Judge Hamilton joined Judge Motz's dissenting opinion, but also wrote a separate dissent, in which Judge Murnaghan joined. Judge Hamilton emphasized that the complaint, fairly read, alleges that Boring complied fully with what she reasonably understood to be the standards, policies and curriculum of the school, and that she was made a scapegoat by the school authorities after some members of the community raised an outcry against ideas expressed in the play she had produced. App. 20a. In response to the concurring opinions of Chief Judge Wilkinson and Judge Luttig, Judge Hamilton argued that the application of the "legitimate pedagogical interest" standard to restrictions on teacher speech involving curricular matters cannot fairly be characterized as an undue intrusion on the right of school authorities to control the curriculum, because this Court held in *Hazelwood* that school authorities' control over *students*' input into the curriculum must satisfy that very standard. App. 21a.

REASONS FOR GRANTING THE WRIT

The holding of the court below is in conflict with the decisions of other circuits and state courts of last resort. Furthermore, this case presents an important constitutional question as to which this Court has not directly spoken, and the Fourth Circuit decided that question in a manner that is at odds with bedrock principles of First Amendment law that this Court has applied in the context of public education.

A. The Fourth Circuit's Holding Creates a Conflict With the Decisions of Other Circuits and State Courts of Last Resort

The Fourth Circuit's decision has created a conflict with the decisions of several circuits and state courts of last resort.

In *Ward v. Hickey*, 996 F.2d 448 (1st Cir. 1993), which involved a teacher's speech in connection with "part of the curriculum," *id.* at 453, the First Circuit held that the proper "test of . . . regulation" of such speech is the *Hazelwood* standard. *Id.* In stark contrast to the Fourth Circuit's holding that all restrictions on teachers' curricular speech *automatically* satisfy that standard, the First Circuit held that the outcome of the *Hazelwood* test in this context "depend[s] on, among other things, the age and sophistication of the students, the relationship between teaching method and valid educational objective, and the context and manner of the presentation." *Id.* The court held as well that, "[e]ven if . . . a school may prohibit a teacher's statements before she makes them, it is not entitled to retaliate against speech that it never prohibited." *Id.* The court explained that teachers have a "First Amendment right . . . to know that conduct is proscribed," *id.* at 454, because "few subjects lack controversy. If teachers must fear retaliation for every utterance, they will fear teaching." *Id.* at 453

Also in conflict with the decision below is the Sixth Circuit's decision in *Stachura v. Truszkowski*, 763 F.2d

211 (6th Cir. 1985), *reversed and remanded on other issues,* 477 U.S. 299 (1986). In that case, the Sixth Circuit held that a secondary school teacher's First Amendment rights were infringed when the school board's decision to suspend him for his use of a biology textbook was based not on established school standards but on after-the-fact hostile community reaction. *Id.* at 213.

The Fourth Circuit's decision in this case also conflicts with the Second Circuit's decision in *Silano v. Sag Harbor School District,* 42 F.3d 719 (2d Cir. 1994). In *Silano* a guest lecturer challenged a school board resolution censuring him for having used an inappropriate film clip in a class presentation. Although the court upheld the board's action, it did so only after determining from the summary judgment record that the disputed film clip was salacious and that the clip had nothing to do with the subject matter of Silano's lecture. *Id.* at 723. Thus, far from holding that the *Hazelwood* test was satisfied simply because curriculum was involved, the Second Circuit held that, precisely because "the lectures were analogous to curriculum," *id.*, it was necessary to determine whether, on the specific facts of the case, the school authorities had shown that the particular action at issue was "reasonably related to legitimate pedagogical concerns." *Id.*

The Fourth Circuit's view that all decisions relating to the curriculum are "by definition" based on legitimate pedagogical concerns, App. 11a, has been squarely rejected by the Eleventh Circuit as well. In *Virgil v. School Board of Columbia County,* 862 F.2d 1517 (11th Cir. 1989), the court held that, in determining whether a school board decision to prohibit the use of a book in the curriculum is permissible under *Hazelwood,* the finder of fact must "look beyond the stated reasons for school board action" to the concerns that *actually* motivated the board, 862 F.2d at 1522 n.6, and then must determine both whether those concerns were legitimate and whether the particular action taken was reasonably related to those concerns. *Id.* at 1522-23. The court expressly rejected

the proposition that, because "the Board decisions at issue were curricular decisions," the *Hazelwood* test could be met without a need to inquire further. *Id.* at 1522.[2]

Decisions from state courts of last resort also are in conflict with the decision below. In *Hosford v. School Committee of Sandwich*, 659 N.E.2d 1178 (Mass. 1996), the Massachusetts Supreme Judicial Court, in an opinion by Justice Charles Fried, held that school officials violated the First Amendment when they disciplined a teacher for curricular speech without affording reasonable notice that the speech might subject her to discipline. And in *Fisher v. Fairbanks North Star Borough Sch. Dist.*, 704 P.2d 213, 217 (Alaska 1985), the Alaska Supreme Court stated that a "school board's authority over . . . classroom materials," though broad, is subject to First Amendment limitations, including the requirement that advance notice be provided before punishment may be imposed. See also *State Board for Community Colleges v. Olson*, 687 P.2d 429, 437 & n.6 (Colo. 1984) (stating that teachers have a First Amendment interest in choice of curricular materials, and rejecting the proposition that teachers' status as employees deprives them of First

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[2] The court below claimed to find support for its holding in *Kirkland v. Northside School District*, 890 F.2d 794 (5th Cir. 1989). But in *Kirkland*, the argument advanced by the teacher and rejected by the court was that teachers have an "unlimited" right to make curricular decisions, without *any* control by school administrators. *Id.* at 801. What is more, the *Kirkland* court emphasized that the school authorities had not acted because of opposition to any ideas contained in the materials that had been used by the teacher but simply because the teacher had failed to submit his reading list for approval as required by school rules. *Id.* The court explained that its decision "should not be misconstrued . . . to suggest that public school teachers foster free debate in their classrooms only at their own risk or that their classrooms must be 'cast with a pall of orthodoxy.'" *Id.* at 801-02. And, in an earlier decision that was not overruled in *Kirkland*, the Fifth Circuit *upheld* the First Amendment claim of a teacher who had been dismissed because of her curricular speech. *See Kingsville School Dist. v. Cooper*, 611 F.2d 1109 (5th Cir. 1980).

Amendment protection with respect to such choices); *Lindros v. Governing Board*, 510 P.2d 361, 370 n.10 (Cal. 1973) (holding that teachers are entitled under state law to fair notice of the circumstances in which they may be disciplined for curricular speech, and observing that federal courts have recognized a federal constitutional right to such notice).

B. This Case Presents an Important Question of Constitutional Law That Has Not Been Directly Addressed by This Court, and the Fourth Circuit Decided That Question in a Manner That Departs From Basic First Amendment Principles Articulated by This Court in the Context of Public Education

1. Because it is the purpose of the public schools to "inculcat[e] fundamental values necessary to the maintenance of a democratic political system," *Ambach v. Norwick*, 441 U.S. 68, 77 (1979), elected school boards and their appointed officials have "important, delicate, and highly discretionary functions." *Board of Education v. Barnette*, 319 U.S. 624, 637 (1943). Yet the very fact "[t]hat they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual." *Id.* And, "in view of the nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, and of action upon thought, in the case of *teachers* brings the safeguards of those amendments vividly into operation." *Shelton v. Tucker*, 364 U.S. 479, 487 (1960) (emphasis added). As the Court put it in *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967), "[o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned."

2. Although these basic principles are clear enough, their application in a case where a teacher has been disciplined because of opposition to ideas expressed in her

teaching or in curricular materials she has selected is not. As we have noted, prior to the decision below, the courts of appeal and the state courts had uniformly acknowledged that teachers have at least some measure of First Amendment protection in this context. But this Court has never addressed that important question.

a. The question is akin in some respects to the question presented in *Board of Education v. Pico*, 457 U.S. 853 (1982), where it was alleged that school officials had removed books from a school library because of opposition to ideas expressed in the books. Although the case produced a badly splintered decision, all members of this Court agreed that there are limits on the authority of school officials to remove books for ideological reasons.[3] However, the Court does not appear to have viewed *Pico* as presenting any question of control over *curriculum*, *see id.* at 861-62, 869 (opinion of Brennan, J.); *id.* at 878 (opinion of Blackmun, J.); and in any event the case did not involve discipline of teachers.

b. This Court's decision in *Hazelwood* goes far toward resolving the question presented here, but is not definitive

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[3] A plurality of four Justices held that "local school boards may not remove books . . . simply because they dislike the ideas contained in those books" but may do so if their action is motivated by concerns over "educational suitability," "appropriateness to age and grade level," and "pervasive[] vulgar[ity]." 457 U.S. at 871-73 (opinion of Brennan, J.); *id.* at 875-76 (opinion of Blackmun, J., concurring in the standard set forth in the opinion of Justice Brennan). Justice White concurred with the plurality that summary judgment should not have been granted because there were important unresolved factual questions as to the school board's motives for removing the books, but he did not articulate a governing standard. *Id.* at 882. The four Justices who dissented stated that they could "cheerfully concede" that the First Amendment had *some* application to decisions removing books from a school library, and that, for example, the Amendment would prohibit "the removal of all books written by or in favor of Republicans" or "all books . . . advocating racial equality and integration," *id.* at 907; but they believed that the plurality's test was too stringent. *Id.* at 908, 920.

because it concerned speech by students rather than by teachers.

In *Hazelwood* the Court held that the authority of school officials over the content of materials produced by students in curricular activities is not absolute, but must be exercised in a manner that is "reasonably related to legitimate pedagogical concerns." 484 U.S. at 273. The Court expressly stated that the student speech at issue—articles in a school newspaper produced by a journalism class—"may fairly be characterized as part of the school curriculum." *Id.* at 271. *See also id.* at 268 (stating that production of the newspaper was "part of the educational curriculum and a 'regular classroom activit[y]' "). Far from suggesting that the curricular nature of the student materials should give school officials unfettered control over their content, this Court held that the officials' action in removing items from the newspaper would be permissible only if it were shown to have been "reasonably related to legitimate pedagogical concerns"; and the Court reviewed the record evidence in detail to determine whether, on the specific facts of the case, the school authorities' action satisfied that test. *See id.* at 274-76.

Hazelwood makes clear—if there ever was any doubt—that even in matters of curriculum, the power of school authorities must be exercised "within the limits of the Bill of Rights." *Barnette*, 319 U.S. at 637. *See also Meyer v. Nebraska*, 262 U.S. 390 (1923); *Epperson v. Arkansas*, 393 U.S. 97 (1968). And, given this Court's recognition that restraints on speech by teachers raise particularly vital First Amendment concerns, *see Shelton, supra*; *Keyishian, supra*; *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring), it would seem apparent that if, as *Hazelwood* holds, the authority of school officials over curriculum cannot, under the First Amendment, give those authorities unbridled discretion to restrain student speech, the same must be true with respect to *teacher* speech.

c. But the question is complicated by the fact, emphasized in Judge Luttig's concurrence as well as in Judge Widener's opinion for the court below, that curricular speech (including, as here, the selection of curricular materials) is speech in which a teacher engages as part of her duties as a public employee. Consideration therefore must be given to the cases that stand for the proposition that, when a speaker's speech is funded by the Government, the Government generally is free to determine what the message shall be, and to take action to ensure that the message is delivered as intended. *See Rust v. Sullivan,* 500 U.S. 173 (1991); *Rosenberger v. Rector & Visitors,* 515 U.S. 819 (1995). *Cf. National Endowment for the Arts v. Finley,* No. 97-371 (pending).

The application of that principle to public employment was at issue in *Arizonans for Official English v. Arizona,* 520 U.S. 43 (1997), but was not addressed by this Court because the case ultimately was determined not to be justiciable. Just last month, the Arizona Supreme Court considered the question that had been before this Court in *Arizonans for Official English,* and held that, by "prohibit[ing] all public . . . employees in Arizona from acting in a language other than English while performing governmental functions," the Arizona Constitution "violates the First Amendment [rights of] . . . public employees." *Ruiz v. Hull,* No. 96-0493, 1998 WL 203081 *13 (Ariz. April 28, 1998). The case at bar presents an opportunity for this Court to address for the first time the important question of the applicability of the First Amendment to speech by public employees in the performance of their governmental functions—although we hasten to add that the question is presented here in a context (public education) which the Court has suggested should constitute an exception to the unfettered power that otherwise might inhere in the Government to dictate the content of speech for which it pays. *See Rust,* 500 U.S. at 200 (suggesting that the notice principle of

Keyishian constitutes an exception); *Rosenberger*, 515 U.S. at 834 (suggesting that *Hazelwood* constitutes an exception). *Cf. Tinker v. Des Moines School Dist.*, 393 U.S. 503, 511 (1969) ("In our system, students may not be regarded as closed-circuit recipients of only that which the state chooses to communicate.")

That teachers engage in speech as part of their jobs also raises an unsettled issue under the "public concern" test of *Connick v. Myers, supra. Connick* drew a distinction between speech by a public employee "*as a citizen* upon matters of *public concern*," and speech "*as an employee* upon matters only of *personal interest*." *Connick*, 461 U.S. at 147 (emphasis added). This Court held that speech in the former category generally is entitled to First Amendment protection as against employment sanctions, while speech in the latter category generally is not. But a teacher's classroom speech concerning controversial public issues, or a teacher's selection of curricular materials addressing such issues, does not fit either side of the *Connick* dichotomy: it constitutes speech "as an employee," but "upon matters of *public* concern." In our view, *Connick*, properly read, denies protection only to speech that constitutes a mere "employee grievance," 461 U.S. at 154, or that otherwise relates solely to the personal interests of the speaker. But, as the opinions below by both Judge Widener and Judge Luttig attest, this is a matter as to which the Court has not yet clearly spoken.

Thus, the question whether the First Amendment places any limits on the power of Government to discipline a teacher for the ideas expressed in her curricular speech involves a matter of great public importance which this Court has never directly addressed, and which is made all the more uncertain by unresolved issues arising out of both the *Rust* and *Connick* lines of cases.

3. Finally, by ruling out even any requirement of *fair notice* where speech involving the curriculum is concerned,

the Fourth Circuit has called into question the application of *Keyishian*, where this Court declared that "[t]he danger of [a] chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform teachers what is being proscribed." *Keyishian*, 385 U.S. at 604. *See also Ward v. Hickey, supra; Stachura v. Truszkowski, supra; Mailloux v. Kiley*, 323 F. Supp. 1387, 1392 (D. Mass.) (Wyzanski, J.), *aff'd.*, 448 F.2d 1242 (1st Cir. 1971); *Parducci v. Rutland*, 316 F.Supp. 352, 356-57 (M.D. Ala. 1970) (Johnson, J.).

As Judge Hamilton noted in his dissent, the allegations in Boring's complaint suggest (and, if the complaint were not dismissed, Boring would undertake to prove) that she was disciplined not because of any legitimate pedagogical concern on the part of the school authorities, but because those authorities deemed it expedient to make her a scapegoat in order to mollify the opposition by a segment of the community to the ideas expressed in a play that Boring had selected in full compliance with school district rules and policies. *See* App. 20a. (*See also Stachura, supra*, in which a teacher was punished in response to community opposition to his use of a textbook that had been approved by school authorities.)

To whatever extent, and in whatever circumstances, the interest of teachers in speaking freely on matters of public concern must yield to the authority of school officials to make pedagogical decisions,[4] the Fourth Circuit's hold-

[4] The six dissenting judges below concluded that the *Hazelwood* formulation—"reasonably related to a legitimate pedagogical concern"—conveys the appropriate limits on the power of school authorities in this context. But even if this Court ultimately were to arrive at a somewhat different formulation, the decision below would have to be reversed unless this Court were to agree with the Fourth Circuit's conclusion that the First Amendment places *no* limits on the power of school authorities to discipline teachers for curricular speech.

ing that school officials need not even provide teachers with the most rudimentary notice of the kinds of speech that are prohibited—indeed, that teachers may be disciplined simply to quell community outcry against ideas expressed in curricular materials that are well *within* the school district's articulated policies on permissible speech —goes far beyond anything that is necessary to protect the ability of school authorities to make and enforce pedagogical policies. Such a rule of law subjects teachers to "a highly efficient *in terrorem* mechanism," *Keyishian*, 385 U.S. at 601, which can only dissuade teachers from exposing students to any materials or ideas that might possibly be found controversial by any segment of the community.

* * * *

The question presented by this case is of fundamental importance to our democracy. It has long been thought that, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion." *Barnette*, 319 U.S. at 642. But the decision below would permit school authorities to discipline a teacher for selecting curricular materials that are regarded, after the fact, as insufficiently "orthodox" to suit the views of the authorities—or of certain members of the community—with respect to politics, social issues, or any other matter of public concern.

In his dissent from the panel opinion, Judge Widener declared that he "[did] not know of a more significant case to be decided in this court in [his] experience." App. 63a. Although that observation may have been extravagant as applied to the narrow and balanced holding of the *panel* opinion, it aptly characterizes the far-reaching significance of the decision of the *en banc* court. That decision exalts school officials' discretion over First Amendment interests in a manner that conflicts with the decisions of other circuits and state courts, and strikes

a discord with the tenor, if not the express holdings, of this Court's seminal decisions regarding the role of the First Amendment in public education.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 95-2593

MARGARET BORING,
Plaintiff-Appellant,

v.

THE BUNCOMBE COUNTY BOARD OF EDUCATION; CHARLES JOHNSON, Chairman, MICHAEL ANDERS; TERRY ROBERSON; BRUCE GOFORTH; BILL WILLIAMS; GRACE BRAZIL; WENDELL BEGLEY; DR. J. FRANK YEAGER, Superintendent; FRED IVEY, Principal, each in his/her individual and official capacity,
Defendants-Appellees.

NATIONAL SCHOOL BOARDS ASSOCIATION; NORTH CAROLINA SCHOOL BOARDS ASSOCIATION; VIRGINIA SCHOOL BOARDS ASSOCIATION COUNCIL OF SCHOOL ATTORNEYS,
Amici Curiae.

Appeal from the United States District Court
for the Western District of North Carolina, at Asheville
Lacy H. Thornburg, District Judge
(CA-93-230)

Argued: March 4, 1997
Decided: February 13, 1998

Before WILKINSON, Chief Judge, and RUSSELL, WIDENER, HALL, MURNAGHAN, ERVIN, WILKINS, NIEMEYER, HAMILTON, LUTTIG, WILLIAMS, MICHAEL, and MOTZ, Circuit Judges

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OPINION

WIDENER, Circuit Judge:

The only issue in this case is whether a public high school teacher has a First Amendment right to participate in the makeup of the school curriculum through the selection and production of a play. We hold that she does not, and affirm the judgment of the district court dismissing the complaint.

I.

Margaret Boring was a teacher in the Charles D. Owen High School in Buncombe County, North Carolina. In the fall of 1991, she chose the play *Independence* for four students in her advanced acting class to perform in an annual statewide competition. She stated in her amended complaint that the play "powerfully depicts the dynamics within a dysfunctional, single-parent family—a divorced mother and three daughters; one a lesbian, another pregnant with an illegitimate child." She alleged that after selecting the play, she notified the school principal, as she did every year, that she had chosen *Independence* as the play for the competition. She does not allege that she gave the principal any information about the play other than the name.

The play was performed in a regional competition and won 17 of 21 awards. Prior to the state finals, a scene from the play was performed for an English class in the school. Plaintiff informed the teacher of that class that the play contained mature subject matter and suggested to

the teacher that the students bring in parental permission slips to see the play. Following that performance, a parent of one of the students in the English class complained to the school principal, Fred Ivey, who then asked plaintiff for a copy of the script. After reading the play, Ivey informed plaintiff that she and the students would not be permitted to perform the play in the state competition.

Plaintiff and the parents of the actresses performing the play met with Ivey urging him not to cancel the production. Ivey then agreed to the production of the play in the state competition, but with certain portions deleted. The complaint states that the students performed the play in the state competition and won second place. The complaint does not state, but we assume, that the play was performed in accordance with Ivey's instructions.

In the summer of 1991 the school moved to a new facility which had a maple stage floor in the auditorium. At the time of the move, plaintiff discussed with Ivey the problems with mounting productions on the maple floor. Ivey suggested using plywood as a temporary surface over the maple floor but instructed plaintiff to obtain approval before doing any construction work in the auditorium. In the spring of 1992, plaintiff advised Ivey that she needed to construct sets for the production of a musical. Ivey responded that he understood the need for sets and that prior approval was intended to apply only to the construction of fixtures. In preparation for the musical, the surface of the maple floor of the stage was covered with plywood fixed to the floor with screws. When the plywood was removed after the play, the floor had to be refinished because of the holes left by the screws.

In June 1992, Ivey requested the transfer of Margaret Boring from Owen High School, citing "personal conflicts resulting from actions she initiated during the course of this school year." Superintendent Yeager approved the transfer stating that she had failed to follow the school

system's controversial materials policy in producing the play. Plaintiff states that the purpose of the controversial materials policy is to give the parents some control over the materials to which their children are exposed in school. She alleges that at the time of the production, the controversial materials policy did not cover dramatic presentations, and that the school's policy was amended subsequently to include dramatic presentations.

Plaintiff appealed the transfer to the Board or Education. A hearing was held on September 2, 1992, following which the Board upheld the transfer. Plaintiff alleges that prior to the hearing there was considerable public discussion of the transfer, including that the play was obscene and that she was immoral. She alleges that members of the school board asked questions at the hearing that demonstrated their consideration of matters outside the evidence presented at the hearing.

Plaintiff filed the present action on January 10, 1994. Her amended complaint claims that her transfer was in retaliation for expression of unpopular views through the production of the play and thus in violation of her right to freedom of speech under the First and Fourteenth Amendments and Article I, § 14 of the North Carolina Constitution. She also claimed a violation of due process under the Fourteenth Amendment and Article I, § 19 of the North Carolina Constitution based on the allegation that members of the school board considered information that was not presented at the hearing; and a violation of a liberty interest under Article I, §§ 1 and 19 of the North Carolina Constitution.

The district court construed the complaint broadly. Not only did it address plaintiff's federal First Amendment claim, it considered claims plaintiff may have made under the federal due process clause of the Fourteenth Amendment; a federal liberty interest claim under the Fourteenth Amendment; a state claim for violation of free speech; a

state claim for deprivation of due process; and a state claim for deprivation of liberty. It decided against the plaintiff on each of these claims.

Plaintiff appeals only the dismissal of her federal First Amendment claim. A divided panel of this court reversed the district court's dismissal of that claim which decision was vacated by the order of the en banc court which granted rehearing. *Boring v. Buncombe County Bd. of Educ.*, 98 F.3d 1474 (4th Cir. 1996), vacated by order of December 3, 1996. We now affirm the judgment of the district court holding that the plaintiff's selection and production of the play *Independence* as part of the school's curriculum was not protected speech under the First Amendment.

We review a dismissal for failure to state a claim *de novo*, drawing all reasonable inferences in favor of the plaintiff and accepting the allegations that are stated in the complaint as true. See *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Republican Party of North Carolina v. Martin*, 980 F.2d 943, 952 (4th Cir.), *cert. denied*, 510 U.S. 828 (1993).

II.

The district court held that the play was a part of the school curriculum and:

> Since plaintiff has not engaged in protected speech, her transfer in retaliation for the play's production did not violate Constitutional standards. (A. 71)

With this holding, the plaintiff takes issue on appeal as follows:

> Whether the district court erred in holding that plaintiff's act of selecting, producing and directing a play did not constitute "speech" within the meaning of the First Amendment. (Boring's brief, p. vi)

We begin our discussion with the definition of curriculum:

> 3: all planned school activities including besides courses of study, organized play, athletics, dramatics, clubs, and homeroom program.

Webster's Third New International Dictionary, 1971, p. 557.

Not only does Webster include dramatics within the definition of curriculum, the Supreme Court does the same. In *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), a case involving student speech in a school newspaper which was edited by the principal of a high school, the Court distinguished cases which require a school to tolerate student speech from those cases in which the school must affirmatively promote student speech. Although in different context, the reasoning of the Court as to what constitutes the school curriculum is equally applicable here.

> The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences [footnote omitted].

Hazelwood, 484 U.S. at 271.

It is plain that the play was curricular from the fact that it was supervised by a faculty member, Mrs. Boring; it was performed in interscholastic drama competitions; and the theater program at the high school was obviously in-

tended to impart particular skills, such as acting, to student participants. These factors demonstrate beyond doubt that "students, parents, and members of the public might reasonably perceive [the production of the play *Independence*] to bear the imprimatur of the school." *Hazelwood*, 484 U.S. at 271.

So there is no difference between Webster's common definition and that of *Hazelwood*.

III.

With these thoughts in mind, we are of opinion that the judgment of the district court is demonstrably correct.

A.

Plaintiff's selection of the play *Independence*, and the editing of the play by the principal, who was upheld by the superintendent of schools, does not present a matter of public concern and is nothing more than an ordinary employment dispute. That being so, plaintiff has no First Amendment rights derived from her selection of the play *Independence*.

This principle was illustrated in *Connick v. Myers*, 461 U.S. 138 (1983), in which the Court upheld the firing of an assistant district attorney who had circulated a questionnaire questioning the manner in which the district attorney operated that office. The Court held that "if Myers' questionnaire cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge." *Connick* at 146. Because the questionnaire almost wholly concerned internal office affairs rather than matters of public concern, the court held that, to that extent, it would not upset the decision of the district attorney in discharging Myers.[1] It stated:

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[1] The last item, that of a question relating to pressuring employees to work in political campaigns on behalf of office supported candidates, the Court considered to be of "limited First Amend-

> We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

Connick at 147.

We followed *Connick* in *DiMeglio v. Haines*, 45 F.3d 790 (1995), in which we upheld the transfer of a public employee who had insisted on advising some affected citizens as to the merits of a zoning dispute contrary to the instructions of his employer. We stated "a government employer, no less than a private employer, is entitled to insist upon the legitimate, day-to-day decisions of the office without fear of reprisals in the form of lawsuits from disgruntled subordinates who believe that they know better than their superiors how to manage office affairs." *DiMeglio* at 806.

In a case on facts so near to those in the case at hand as to be indistinguishable, the Fifth Circuit came to the conclusion we have just recited in *Kirkland v. Northside Independent School District*, 890 F.2d 794 (5th Cir. 1989), *cert. denied*, 490 U.S. 926 (1990). *Kirkland* was a case in which the employment contract of a high school history teacher was not renewed. He alleged the nonrenewal was a consequence of, and in retaliation for, his use of an assistant district attorney who had circulated a The high school had provided the teacher with a supplemental reading list for his history class along with a copy of the guidelines used to develop and amend that list.

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ment interest." It held that Myers' discharge did not offend the First Amendment because the district attorney "reasonably believed that [the question] would disrupt the office." *Connick* at 154.

He was aware of the guidelines and understood that if he was dissatisfied, a separate body of reading material could be used in his class if he obtained administrative approval. The teacher, however, used his own substitute list and declined to procure the approval of the school authorities for his substitute list. The authorities at his high school then recommended that his contract not be renewed at the end of the next academic year, which was affirmed by the board of trustees, much like Margaret Boring's transfer was affirmed by the school board in this case after a recommendation by the administrative authorities.

The court held that to establish his constitutional claim, Kirkland must have shown that his supplemental reading list was constitutionally protected speech; not different from Mrs. Boring's selection of the play *Independence* in this case. It went on to hold that under *Connick v. Myers*, 461 U.S. 138 (1983), the question of whether a public employee's speech is constitutionally protected depends upon the public or private nature of such speech. It decided that the selection of the reading list by the teacher was not a matter of public concern and stated that:

> Although, the concept of academic freedom has been recognized in our jurisprudence, the doctrine has never conferred upon teachers the control of public school curricula. [footnote omitted]

890 F.2d at 800. And the *Kirkland* court recognized that *Hazelwood* held that public school officials, consistent with the First Amendment, could place reasonable restrictions upon the subject matter to a student published newspaper and also that schools are typically not public forums.

The court stated that "[w]e hold only that public school teachers are not free, under the first amendment, to arrogate control of curricula," 890 F.2d at 802, and concluded as follows:

> In summary, we conclude that Kirkland's world history reading list does not present a matter of public

> concern and that this case presents nothing more than an ordinary employment dispute. Accordingly, Kirkland's conduct in disregarding Northside's administrative process does not constitute protected *speech* . . . .

890 F.2d at 802.

Since plaintiff's dispute with the principal, superintendent of schools and the school board is nothing more than an ordinary employment dispute, it does not constitute protected speech and has no First Amendment protection. Her case is indistinguishable from Kirkland's.

B.

The plaintiff also contends that the district court erred in holding that the defendants had a legitimate pedagogical interest in punishing plaintiff for her speech. Of course, by speech, she means her selection and production of the play *Independence*.

As we have previously set out, the play was a part of the curriculum of Charles D. Owen High School, where plaintiff taught. So this contention of the plaintiff is in reality not different from her first contention, that is, she had a First Amendment right to participate in the makeup of the high school curriculum, which could be regulated by the school administration only if it had a legitimate pedagogical interest in the curriculum. While we are of opinion that plaintiff had no First Amendment right to insist on the makeup of the curriculum, even assuming that she did have, we are of opinion that the school administration did have such a legitimate pedagogical interest and that the holding of the district court was correct.

Pedagogical is defined as "2: of or relating to teaching or pedagogy. EDUCATIONAL." *Websters's Third New International Dictionary*, 1971, p. 1663. There is no doubt at all that the selection of the play *Independence* was a part of the curriculum of Owen High School.

The makeup of the curriculum of Owen High School is by definition a legitimate pedagogical concern. Not only does logic dictate this conclusion, in only slightly different context the Eleventh Circuit has so held as a matter of law: "Since the purpose of a curricular program is by definition 'pedagogical' . . . ." *Searcey v. Harris*, 888 F.2d 1314, 1319 (11th Cir. 1989). *Kirkland*, 890 F.2d at 795, held the same in the same context present here.

If the performance of a play under the auspices of a school and which is a part of the curriculum of the school, is not by definition a legitimate pedagogical concern, we do not know what could be.

In our opinion, the school administrative authorities had a legitimate pedagogical interest in the makeup of the curriculum of the school, including the inclusion of the play *Independence*. The holding of the district court was correct and the plaintiff's claim is without merit.

IV.

The question before us is not new. From Plato to Burke, the greatest minds of Western civilization have acknowledged the importance of the very subject at hand and have agreed on how it should be treated.

> For a young person cannot judge what is allegorical and what is literal; anything that he receives into his mind at that age is likely to become indelible and unalterable; and therefore it is most important that the tales which the young first hear should be models of virtuous thoughts.

Plato's *Republic: Book II*, Jowett Translation, Walter J. Black, Inc., 1942, p. 281.

> The magistrate, who in favor of freedom thinks himself obliged to suffer all sorts of publications, is under a stricter duty than any other well to consider what sort of writers he shall authorize, and shall recommend by the strongest of all santcions, that is, by public honors and rewards. He ought to be cautious

> how he recommends authors of mixed or ambiguous morality. He ought to be fearful of putting into the hands of youth writers indulgent to the peculiarities of their own complexion, lest they should teach the humors of the professor, rather then the principles of the science.

Letter to a Member of the National Assembly (1791). IV, 23-34, found in *The Philosophy of Edmund Burke*, University of Michigan Press, 1960, p. 247.

And Justice Frankfurter, in concurrence, related the four essential freedoms of a university, which should no less obtain in public schools unless quite impracticable or contrary to law:

> It is an atmosphere in which there prevail "the four essential freedoms" of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.

Sweezy v. New Hampshire, 354 U.S. 234, 255, 263-264 (1957) (quoting from a statement of a conference of senior scholars from the University of Cape Town and the University of the Witwatersrand, including A. v. d. S. Centlivres and Richard Feetham, as Chancellors of the respective universities [footnote omitted]).

We agree with Plato and Burke and Justice Frankfurter that the school, not the teacher, has the right to fix the curriculum. Owens being a public school does not give the plaintiff any First Amendment right to fix the curriculum she would not have had if the school were private. *Connick*, 461 U.S. at 147.

Someone must fix the curriculum of any school, public or private. In the case of a public school, in our opinion, it is far better public policy, absent a valid statutory directive on the subject, that the makeup of the curriculum be entrusted to the local school authorities who are in some

sense responsible, rather than to the teachers, who would be responsible only to the judges, had they a First Amendment right to participate in the makeup of the curriculum.

The judgment of the district court is accordingly

AFFIRMED.[2] [3]

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[2] It is appropriate to add what we have not decided. This is not a case concerning pupil speech, as in *Hazelwood*, either classroom or otherwise. This case concerns itself exclusively with employee speech, as does *Connick*, whether or not a public high school teacher has a First Amendment right to insist on a part of the curriculum of the school. The case does not concern any right a teacher might have to participate in the makeup of the curriculum of a public high school other than the right claimed here under the First Amendment. "Perhaps the government employer's dismissal of the worker may not be fair, but ordinary dismissals from government service which violate no fixed tenure or applicable statute or regulation are not subject to judiical review even if the reasons for the dismissal are alleged to be mistaken or unreasonable." *Connick* at 146-147.

Plaintiff's contention that she was not given notice as to what was being proscribed is, of course, without merit, the plaintiff having no First Amendment right to participate in the makeup of the curriculum.

[3] The dissenting opinion of Judge Motz takes issue with the issue in the case as stated by the majority.

As stated by the majority:

> The only issue in this case is whether a public high school teacher has a First Amendment right to participate in the make up of the school curriculum through the selection and production of a play. We hold that she does not . . . .

Slip, p. 2.

As stated by Judge Motz:

> The majority holds that a teacher's speech in selecting, producing, and directing a school play deserves "no First Amendment protection." Ante at p. 9, I cannot agree . . . .

Dissenting opinion of Judge Motz at p. 20.

The dissent departs, however, from its plain statement of the issue, which is not different from that in Mrs. Boring's brief, p. vi, and on page 22 adopts as the issue an argument of Mrs. Boring,

WILKINSON, Chief Judge, concurring:

Traditionally, indeed for most of our history, education has been largely a matter of state and local concern. The dissents, however, approach education as a federal judicial enterprise. The dissenters seize upon one loose, slippery, litigious phrase—"legitimate pedagogical concern"—and consign it to the mercies of the federal courts. They provide not one iota of guidance to local school administrators on the interpretation of this tantalizing formulation, nor could they. What is "legitimately pedagogical" will inevitably mean one thing to one judge or jury and something else to another.

This is precisely the process by which 42 U.S.C. § 1983 becomes an instrument of disenfranchisement. In this case, that provision would remove from students, teachers, parents, and school boards the right to direct their educational

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which is she "argues that having passed on the play prior to its production and performance, the school does not have a right to discipline [her] in retaliation for its use in the curriculum." The disenting opinion then largely proceeds on that theory of Mrs. Boring's argument, rather than the issue as above stated. That argumnet, however, is apparently based on some kind of due process argument, which was decided adversely to her, and which she has not appealed. This is set out in the majority opinion at p. 5.

We also note that the dissenting opinion depends, at least in part, on its parenthetical statement, at p. 27, that "[t]he majority apparently does not contest one portion of the panel's (now vacated) holding, *see Boring*, 98 F.3d at 1478-1479, i.e., that Boring's selection and production of the play constitute speech for purposes of the First Amendment." The insistence on significance of the fact that the majority does not contest a *vacated* holding of the panel is puzzling, at least, and is worthy of mention only to note that the dissent of Judge Motz emphasizes, as well as does that of Judge Hamilton, that neither logic, nor precedent, nor the wisdom of the ages, supports their position on the issue *as stated by Mrs. Boring* in her brief on p. vi and restated here on page 6. The dissents erroneously continue to equate "speech" with "protected speech."

curricula through democratic means. The curricular choices of the schools should be presumptively their own—the fact that such choices arouse deep feeling argues strongly for democratic means of reaching them.*

I would affirm the judgment of the district court.

LUTTIG, Circuit Judge, concurring:

I agree fully with the unassailable conclusion of the majority that *the First Amendment* does not require school boards to allow individual teachers in the Nation's elementary and secondary public schools to determine the curriculum for their classrooms consistent with their own personal, political, and other views. Thus, I agree with the court's rejection of the dissent's position, *see post* at 20 (Motz, J., dissenting), that the Buncombe County Board of Education is required by the First Amendment to defend in federal court its decision to disallow Ms. Boring from producing a play on lesbianism in the classrooms of the County's high school.

I also agree with the court's application of the public employee speech cases of *Connick v. Myers,* 461 U.S. 138 (1983), and *Pickering* v. *Board of Education,* 391 U.S. 563 (1968), in the resolution of this dispute. Whether or not it can be argued that the standard set forth in these cases is suitable in analyzing restrictions on teachers' in-class *noncurricular* speech, the standard announced in these cases is eminently reasonable in analyzing restrictions on teachers' in-class *curricular* speech—unless, of course, one mistakenly assumes, as indeed the dissent does, that every word of curricular speech uttered by a teacher within the classroom is, by definition, speech "as a citizen on a matter of public concern" *within the intendment of*

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* The dissents contend that all the intrusiveness occasioned by the term "legitimate pedagogical concern" can be ascribed to the Supreme Court. It is obviously not the Supreme Court's use of the phrase to which I object, but the dissents' aggressive misapplication of it to all curricular decisions.

Connick and Pickering. Cf. post at 25 (Motz, J., dissenting) (asserting that *"Connick* . . . does not provide a workable formula for analyzing whether the First Amendment protects teacher's in-class speech" because all in-class teacher speech is on matter of public concern, but without distinguishing between in-class curricular and in-class non-curricular teacher speech). Indeed, the analogy would seem to be pure between a teacher who, *qua* teacher, attempts to assert her own views through the curriculum itself, and any other public employee who, *qua* employee, attempts to assert her personal views through the official policies and decision of her office. Neither the question of whether a teacher has a First Amendment right when she speaks in the classroom generally, other than through the curriculum itself, nor the question of whether *Connick* applies in this quite different context, is before the court today, contrary to the belief of the dissent.

In reaching the conclusion that the Buncombe County Board of Education is constitutionally required to justify for Ms. Boring its decision not to permit production of the play she selected, the dissent relies on the Supreme Court's decision in *Hazelwood School District* v. *Kuhlmeier,* 484 U.S. 260 (1988), but selectively quotes from the Court's opinion in that case so as to leave the impression that *Hazelwood* dealt with a teacher's First Amendment right to express herself through the curriculum itself, rather than with a student's First Amendment rights to speak within a curricular setting. Thus, the dissent states that,

> in *Hazelwood* the Court held that school administrators' curriculum choices did not offend the First Amendment *"so long* as their actions are reasonably related to *legitimate* pedagogical concerns." Indeed, the Court went on to recognize that, on occasion a particular curriculum decision may have "no valid

> educational purpose" and that in such an instance "the First Amendment is so directly and sharply implicate[d] as to require judicial intervention[;]"

post at 23, whereas the Court actually stated:

> [*W*]*e hold that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities* so long as their actions are reasonably related to legitimate pedagogical concerns. . . . *It is only when the decision to censor a school-sponsored publication, theatrical production, or other vehicle of student expression* has no valid educational purpose that the First Amendment is so "directly and sharply implicate[d] as to require judicial intervention *to protect students' constitutional rights.*"

484 U.S. at 273 (footnote and citations omitted; emphasis added). From its perceived need to omit from the *Hazelwood* passages upon which it explicitly relies and partially quotes, all references within those passages—even within the holding itself—to the fact that the Court was concerned in that case only with student speech, it is clear that the dissent recognizes that *Hazelwood* offers no support for its position in this case.

Notwithstanding its obvious recognition of the inapplicability of *Hazelwood*, the dissent would nevertheless import wholesale *Hazelwood's* test for evaluating restrictions on *student* speech *within* curricular activities into the entirely different context of *teacher* speech *through* the curriculum itself. That is, not only does the dissent deny, through simple omission of the relevant portions of text from the Court's opinion, that *Hazelwood* was concerned only with student speech; it fails to recognize the elementary difference between teacher in-class speech which is curricular, and teacher in-class speech which is noncurricular, because it assumes that every word uttered by a

teacher in a classroom is curriculum. In the latter context of teacher in-class noncurricular speech, the teacher assuredly enjoys some First Amendment protection. In the former context of teacher in-class curricular speech, the teacher equally assuredly does not.

Of course, we are presented in this case not with *student* speech *within* a curricular activity (such as in *Hazelwood*), but rather, with *teacher or employee* speech literally *through* the curriculum itself. The differences are plain—the ultimate question for our resolution being whether a teacher has a constitutional right to define, at least in part, the school's curriculum, over the informed judgments of both school boards and parents. As noted, mistakenly applying *Hazelwood* in the first instance, and then, in its alternative reasoning, mistakenly ssuming that every word spoken in the classroom by a teacher is a matter of public concern *within the meaning of Connick and Pickering,* the dissent would hold that every teacher has such a right. Today, however, the court properly concludes that she does not. Of course, were it otherwise —that is, were every public school teacher in America to have the constitutional right to design (even in part) the content of his or her individual classes, as the dissent would have it—the Nation's school boards would be without even the most basic authority to implement a uniform curriculum and schools would become mere instruments for the advancement of the individual and collective social agendas of their teachers.

Rhetorically, the dissent attempts to minimize the radicalization of the educational process that would follow upon its *proposed* holding, by assuring that school officials "must and [would] have final authority over curriculum decisions," and that all that would be required is the mere articulation by the school board of any "legitimate pedagogical concern." Even if these observations as to the dissent's *proposed* holding were true, the requirement that

school systems across the country make their curriculum decisions in anticipation of litigation, and then engage in the time-consuming processes of discovery, pretrial litigation, and trial in federal court to defend as 'legtimately pedagogical" their individual curriculum decisions, would itself represent a crushing burden, not to mention a surrender to unelected federal judges of the "final authority over curriculum decisions" that is properly that of school boards and parents.

But one should be under no illusions that the particular requirement of "legitimate pedagogy" that the dissent has in mind could ever be so easily satisfied or that, in reality, the dissent contemplates final decision-making authority for curriculum resting with the Nation's schoolboards. The indisputable subtext of the dissent, which could hardly go unnoticed, is that "legitimate" pedagogy will be not what the parents and schoolboards decide it should but, rather, what the judges say it will be. If any confirmation of this is necessary, one need look no further than to Judge Hamilton's separate opinion, in which he has already concluded, without even so much as an allegation to this effect by the plaintiff, that the defendants, "all for the sole purpose of shielding the principal and the Board from the wrath of the public outcry," targeted Margaret Boring as a scapegoat and used her to shield them from the 'heat' of the negative outcry resulting from the performance of Independence." *Post* at 18-19 (Hamilton, J., dissenting).

Judge Wilkins and Judge Williams join in this concurrence.

HAMILTON, Circuit Judge, dissenting:

I join in Judge Motz's persuasive dissenting opinion. I write separately to emphasize several points. First, the facts as alleged in the complaint suggest strongly that this

case is far from an "ordinary employment dispute," *i.e.*, a case involving only speech of a private concern, as the majority dismissively states. *Ante* at 7. Instead, as gleaned from a fair reading of the complaint, this is a case about a school principal, Fred Ivey, and a county school board, the Buncombe County Board of Education (the Board), who targeted Margaret Boring as a scapegoat and used her to shield them from the "heat" of the negative outcry resulting from the performance of Independence. This is also a case about a dedicated teacher who, contrary to the implication of the majority and concurring opinions, in no way violated any aspect of an approved curriculum; who followed every previously required standard set forth for the selection and approval of the school production; who, when requested to do so, redacted certain portions of the production and only permitted its performance after that performance had been explicitly approved by her principal, Mr. Ivey; yet, who nevertheless lost her position as a result of the production, all for the sole purpose of shielding the principal and the Board from the wrath of the public outcry. Despite the complete absence of any articulated, legitimate reason for restricting Boring's speech, this court today permits her dismissal, in its oblique reference to Federal Rule of Civil Procedure12(b)(6), without requiring *any* explanation from Ivey or the Board, holding that they are absolved of any wrongdoing under § 1983, *see* 42 U.S.C. § 1983, because Boring engaged in no protected speech. Because this dispute originated in, and was entirely the result of, public debate, I believe that the Board, as a public employer that allegedly acted in response to that public debate, should be required to articulate some legitimate, pedagogical concerns for restricting Boring's speech. This burden is hardly onerous, and it is the least we can require of public officials charged with making curriculum decisions.

Second, it should not be overlooked that this case presents one simple question: Can the Board sensor Boring's speech without proffering *any* legitimate pedagogical concern justifying the restriction? Judge Motz's dissent persuasively explains why the answer to this simple question is no. In all likelihood, if remanded, this case would be resolved in favor of the Board at the summary judgment stage, as several pedagogical concerns probably justified the Board's action. At this early stage, the Rule 12(b)(6) stage, however, we have no basis for determining whether the Board's restriction reasonably related to legitimate pedagogical concerns. For this reason, the judgment of the district court should be reversed and the matter remanded for further proceedings.

A final note concerning the concurring opinions of Chief Judge Wilkinson and Judge Luttig. These opinions attack the dissenting opinion as consigning to the federal judiciary the responsibility for managing our public schools. Nothing could be further from reality. What these opinions ignore, however, is that any limited intrusion, whatever it may be, is precisely the intrusion required by the Supreme Court's decision in *Hazelwood*. The Supreme Court established the *Hazelwood* standard and, in doing so, clearly envisioned some minimal intrusion into public school management insofar as school administrators would be required to articulate a legitimate pedagogical concern for censoring a student's speech. The Supreme Court apparently did not believe this standard to be too ambiguous for district and appellate courts to apply, nor did it apparently believe this standard to place an unjustly onerous burden on school officials. Therefore, even if the parade of horribles feared by the concurrences came to pass, it is a parade of horribles created by a standard articulated by the Supreme Court and one to which we are bound to adhere until the Supreme Court states otherwise.

Judge Murnaghan joins in this dissent.

DIANA GRIBBON MOTZ, Circuit Judge dissenting:

The majority holds that a teacher's speech in selecting, producing, and directing a school play deserves "no First Amendment protection." *Ante* at 9. I cannot agree and therefore respectfully dissent. In my judgment, the district court erred in dismissing Margaret Boring's complaint for failure to state a claim upon which relief can be granted.

School administrators must and do have final authority over curriculum decisions. But that authority is not wholly unfettered. Like all other state officials, they must obey the Constitution. The Supreme Court has long recognized that the Constitution, specifically the First Amendment, "does not tolerate laws that cast a pall of orthodoxy over the classroom." *Keyishian v. Board of Regents,* 385 U.S. 589, 603 (1967). *See also Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 506 (1969) ("teachers" no less than "students" do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate"). Thus, teachers' in-class speech retains some, albeit limited, First Amendment protection, as is explained in detail in the panel opinion in this case. *See Boring v. Buncombe County Bd. of Educ.*, 98 F.3d 1474, 1475-85 (4th Cir. 1966). To that opinion, I add only a few thoughts.

I.

First, although the majority notes the correct standard of review, *ante* at 5 ("[w]e review a dismissal for failure to state a claim *de novo,* drawing all reasonable inferences in favor of the plaintiff and accepting the allegations that are stated in the complaint as true"), it fails to apply this standard.

Examination of Margaret Boring's complaint is instructive. Boring alleges that she is a "tenured teacher" in the Buncombe County public schools, that she has "built a national reputation for excellence in teaching drama

and directing and producing theater," and that "[h]er plays have won numerous awards and, each year, many of her students have gone on to college on theater-related scholarships." She further alleges that in the fall of 1991 —twelve years after her initial employment by the Board, after her plays had been "regularly" entered in competition and won "numerous awards"—she notified her principal *"as she did every year"* of the name of the play she had chosen for the annual competition, and the principal "did not comment or react." (Emphasis added.)

True, as the majority observes, Boring "does not allege that she gave the principal any information about the play other than the name." *Ante* at 3. But a fair reading of the above allegations, let alone a reading that gives Boring "all reasonable inferences" from them, reveals that Boring provided her principal with precisely the same advance notice of the chosen play that she had in every previous year—notice that, until 1991, had been sufficient. According to Boring, the principal did not question her choice, ask for further information, or in any way "comment or react" to her choice. It may be that Boring pulled a fast one on the principal, choosing a more controversial play than in previous years and giving him just its name to preclude negative reaction from him. Nothing in the complaint supports this inference, however, and the School Board has not so asserted.

Boring further alleges that no violation of the "controversial materials policy" provided a basis for her transfer and that the play was performed in the state competition only after the principal insisted that she delete certain portions of the play. Taking all of these allegations together, a fair reading of them is that Boring complied with the school administration's requirements and policies in every respect, but was nonetheless disciplined "to punish and retaliate against her for expressing an unpopular point of view through the production of the play" in violation of her First Amendment rights. Thus, as the district court

recognized, Boring "does not ask the Court to find that a unilateral selection and production of the play 'Independence,' without prior approval, would have been protected First Amendment speech"; rather, she "argues that having passed on the play prior to its production and performance, the school does not have a right to discipline [her] in retaliation for its use in the curriculum." It is this complaint that Boring presents to us, and this complaint that we must assess to determine whether it states a claim upon which relief can be granted.

The Board may indeed have "legitimate pedagogical concerns" that are "reasonably related" to its disciplinary decision. *See Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988). But, of course, Boring alleges no such concerns and the Board has not yet stated any. Hence, nothing in the record before us, at this early stage in the proceedings, allows us to draw such a conclusion. Prior to today, every court to consider the matter has required that school administrators offer some evidence—if only an affidavit—to establish the legitimacy of the pedagogical concerns purportedly related to their actions. *See Boring*, 98 F.3d at 1479. The majority, however, concludes that even this slight evidentiary showing is unnecessary.[1] The majority maintains that because "pedagogical" is defined as "educational," any and every curriculum decision made by school administrators is "by definition a legitimate pedagogical concern" and thus constitutionally acceptable. *Ante* at 10.

The Supreme Court's careful reasoning in *Hazelwood*, an opinion authored by Justice White and joined by all members of the present Court then sitting (the Chief Justice, and Justices Stevens, O'Connor, and Scalia), offers no

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[1] Requiring school authorities to submit a single affidavit demonstrating the factual basis for their pedagogical concerns hardly imposes a "crushing burden" on them. *Ante* at 17 (Luttig, J. concurring).

support for this astonishing conclusion.[2] Rather, in *Hazelwood* the Court held that school administrators' curriculum choices did not offend the Fist Amendment "*so long* as their actions are reasonably related to *legitimate* pedagogical concerns." *Hazelwood*, 484 U.S. at 273 (emphasis added). Indeed, the Court went on to recognize that, on occasion, a particular curriculum decision may have "no valid educational purpose" and that in such an instance "the First Amendment is so directly and sharply implicate[d] as to require judiical intervention." *Id.* (citation and internal quotation omitted; alteration in original). Thus, the Supreme Court in *Hazelwood* clearly did not hold, as the majority does here, that each and every curriculum decision is "*by definition* a legitimate pedagogical concern." *Ante* at 10 (emphasis added). Instead, the Court meticulously analyzed the speech before it and concluded that the school administrators had demonstrated—through the testimony of several witnesses—the legitimacy of their pedagogical concerns and that *for this reason* "no violation of First Amendment rights occurred." *Id.* at 275-76.

Nor do the two cases upon which the majority relies, *ante* at 10, support its holding that each and every curriculum decision of a school administration is "by definition a legitimate pedagogical concern." In neither *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794 (5th Cir. 1989); *cert. denied*, 490 U.S. 926 (1990), nor *Searcey v. Harris*, 888 F.2d 1314 (11th Cir. 1989), did

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[2] Of course, as noted in the panel opinion, "*Hazelwood* directly addresses the free speech rights of students, not teachers." *Boring*, 98 F.3d at 1482. *Hazelwood*, however, is the Supreme Court's most recent discussion of the protection due *curricular* speech and the majority and concurrences apparently believe that it is the curricular nature of Boring's speech that deprives it of *all* First Amendment protection. For this and the other reasons discussed in the panel opinion, I continue to believe that the *Hazelwood* analysis provides the "best means" of evaluation of the speech at issue here. *Id.*

the courts hold that the plaintiffs failed to state a claim upon which relief could be granted or that school administrators' decisions were motivated by legitimate pedagogical concerns simply because those decisions concerned the curriculum.

In *Kirkland*, the Fifth Circuit did conclude that the teacher "suffered no impairment of his First Amendment rights." *Kirkland*, 890 F.2d at 795. But that teacher, Timothy Kirkland, unlike Boring, admitted that he refused to follow the school's well-established rules. For example, he admitted using a "*nonapproved* reading list." *Kirkland*, 890 F.2d at 795 (emphasis added). Boring, by contrast, alleges that her principal initially acquiesced in her choice and production of *Independence*. Moreover, Kirkland did not concede, as Boring does, that the school authorities were entitled to the broad discretion vested in them under the *Hazelwood* standard. Rather, Kirkland contended that "his control of the world history class curriculum [was] *unlimited*." *Kirkland*, 890 F.2d at 801 (emphasis added). The *Kirkland* court properly rejected this argument. *Id.* But the Fifth Circuit's reasoning in *Kirkland* does not foreclose Boring's quite different and far more modest contention that although administrators may discipline a teacher even when the teacher *does* follow the school's rules, they may do so only "so long as [administrators'] actions are reasonably related to legitimate pedagogical concerns." *Hazelwood*, 484 U.S. at 273. Actually, rather than foreclosing this reasoning, the *Kirkland* court seemed to embrace it: "Our decision should not be misconstrued . . . to suggest that public school teachers foster free debate in their classrooms only at their own risk or that their classrooms must be 'cast with a pall of orthodoxy.'" *Kirkland*, 890 F.2d at 801-02.

In *Searcey*, the Eleventh Circuit recognized, as I do, that curricular programs by nature have pedagogical purposes. *See* 888 F.2d at 1319. But it did not hold, as the majority does here, that each and every curricular decision

is "by definition a *legitimate* pedagogical concern." *Ante* at 10 (emphasis added). In fact, the Eleventh Circuit's holding stands in stark contrast to that set forth by the majority. The *Searcey* court *upheld* a judgment against a school board precisely because the board offered "*no evidence*" to support its challenged requirement. *Searcey*, 888 F.2d at 1322 (emphasis added). The court reasoned "[w]e cannot infer the reasonableness of a regulation from a vacant record." *Id.* (citing *Hazelwood*, 484 U.S. at 275 & n.8). Moreover, *Searcey* expressly rejected the school board's argument that even though it failed to offer any evidentiary support, a court must defer to its decision; the court concluded that this would "overstate[] the deference a court must pay to School Board decisions." *Id.* at 1321. The majority erroneously relies on *Searcey* to do precisely what the *Searcey* court itself would not do—overstate the deference due school board decisions and infer the reasonableness of such decisions from a vacant record.

The Buncombe County Board of Education may possess legitimate pedagogical concerns reasonably related to its discipline of Boring. But, to date, the Board has not even attempted to state those concerns, let alone offered a scintilla of evidence establishing them. On this record, I do not see how a court can conclude, as the majority does, that "the school administrative authorities had a legitimate pedagogical interest" justifying discipline of Boring and dismissal of her complaint. *Ante* at 10.

II.

Like the district court, Boring, and the two associations that filed amici briefs on behalf of the School Board (the National School Boards Association and the Virginia School Board Association Council of School Board Attorneys), I believe that the standard articulated in *Hazelwood*, not that set forth in *Connick v. Myers*, 461 U.S. 138 (1983), provides the appropriate test for analyzing the speech at issue in this case. But, contrary, to the ma-

jority's suggestion, even if *Connick* were applicable here, it would fail to provide an alternative basis on which to dismiss Boring's complaint.

A.

Connick held that a court generally determines whether a public employee's speech is constitutionally protected by balancing the employee's interest, " 'as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.' " *Id.* at 142 (quoting *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968)). Under *Connick*, Boring must first establish that her speech related to "a matter of public concern." *See Connick*, 461 U.S. at 146. If she does so, school authorities may still prevail, provided they can show that their interest in workplace efficiency and harmony outweighs Boring's interest in commenting upon the matters of public concern. *See Board of County Comm'rs v. Umbehr*, —— U.S. ——, 116 S.Ct. 2342, 2347-48 (1996); *Connick*, 461 U.S. at 1467-47; *Pickering*, 391 U.S. at 568.

In my view, the *Connick* framework does not provide a workable formula for analyzing whether the First Amendment protects a teacher's in-class speech. Neither element of the *Connick* balancing test provides much assistance in assessing whether this speech is entitled to constitutional protection.

The public concern element articulated in *Connick* fails to account adequately for the unique character of a teacher's in-class speech. When a teacher steps into the classroom she assumes a position of extraordinary public trust and confidence: she is charged with educating our youth. Her speech is neither ordinary employee workplace speech nor common public debate. Any attempt to force it into either of these categories ignores the essence of teaching—to educate, to enlighten, to inspire—and the importance

of free speech to this most critical endeavor. As the Supreme Court proclaimed more than forty years ago: "Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

Moreover, the governmental interest element as set forth in *Connick* fails to give school administrators the necessary and appropriate control over a teacher's in-class speech. School administrators should be free to specify curriculum and to curtail classroom speech for *any* legitimate pedagogical reason. They should not be required to demonstrate that a restriction on in-class speech is necessitated by workplace efficiency or harmony. Accordingly, as more fully set forth in the panel opinion, I believe the simpler and more rigorous *Hazelwood* analysis should apply to a teacher's in-class speech, as well as a student's in-class speech. *See Boring*, 98 F.3d at 1482-83.

B.

However, even if the *Connick* test applied to a teacher's in-class speech, we would be required to conclude that the district court erred in dismissing Boring's complaint. Although Boring's in-class speech does not itself constitute pure public debate, obviously it does "relate to" matters of overwhelming public concern—family life, divorce, motherhood, and illegitimacy, among others. Thus, if the *Connick* analysis did apply to in-class speech, then Boring's choice and production of a play that raises a number of important social issues obviously falls within the Supreme Court's broad definition of "public concern," which includes speech "*relating to any matter* of political, social, or other concern to the community." *Connick*, 461 U.S. at 146 (emphasis added). *See also id.* at 149 (speech need only "touch" on a matter of public concern in order

to trigger an employer's burden to justify restrictions on it).

I have trouble understanding the basis for the majority's contrary holding that Boring's selection and production of the play amounts to "nothing more than an ordinary employment dispute" and does not involve a matter of public concern under *Connick*. *Ante* at 9. (The majority apparently does not contest one portion of the panel's (now vacated) holding, *see Boring*, 98 F.3d at 1478-1479, i.e., that Boring's selection and production of the play constitute speech for purposes of the First Amendment. Thus, the majority notes, "[t]his case concerns itself exclusively with employee *speech*." *See ante* at 12 n.2 (emphasis added)).

Conceivably, the majority's holding is grounded in misreading *Connick* to make the role in which a public employee speaks determinaitve of whether her speech merits First Amendment protection. *Connick* does distinguish between an employee speaking "as a citizen on matters of public concern" and an employee speaking "as an employee upon matters of personal interest." *Connick*, 461 U.S. at 147. But *Connick* never hold that a public employee automatically loses all First Amendment protection whenever she speaks in her role as employee on a matter of public concern. Indeed, the *Connick* Court implicitly repudiates such a conclusion, by directing that factors other than the role of the speaker are critical to determining when an employee speakes on a matter of public concern—"[w]hether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement." *Id.* at 147-48. Moreover, *Connick* itself held that one of the statements of the government employee before it, although in the same form and context as her other statements (a questionnaire circulated by the employee only within her office) and although quintessentially speech by

an employee in her role as an employee, did "touch[] upon a matter of public concern." *Id.* at 149.

Furthermore, to read *Connick* as holding that *any* speech by a public employee in her role as an employee fails to merit First Amendment protection would contravene other controlling precedent. Both the Supreme Court and this court have held that a teacher's in-class speech, which by definition involves speech by a teacher in her role as an employee, warrants protection. *See, e.g., Keyishian,* 385 U.S. at 602-603 (regulatons *inter alia* restricting teachers' in-class speech held to violate the First Amendment); *Piver v. Pender County Bd. of Educ.,* 835 F.2d 1076, 1081 (4th Cir. 1987), *cert. denied,* 487 U.S. 1206 (1988). Because the majority does not explicitly hold that the role in which an employee speaks is determinative or attempt to distinguish *Keyishian* or overrule *Piver,* this reasoning must not be the basis for its conclusion that Boring's speech does not relate to a matter of public concern.

The only possible basis that I can see for the majority's holding is a mistake as to the nature of Boring's claim. The speech for which Boring seek First Amendment protection does not constitute a private personnel grievance. Boring does not allege that she selected and produced *Independence* after being instructed not to choose that play, nor does she allege that school administrators disciplined her because she publicized her dissatisfaction with their treatment of her. Such a claim, much like Kirkland's insistence on using a disapproved reading list, would constitute an "ordinary employment dispute" rather than speech relating to a matter of public concern. Boring instead alleges that the school administration disciplined her for the selection and production of the play itself. This is not an employment dispute. Rather, it is a challenge to a restriction on classroom speech, which involves matters of public concern.

Thus, if the *Connick* analysis applied here, a court could only conclude that Boring has alleged that she was disciplined for speech "relating to a matter of public concern." We would then have to proceed to the other half of the *Connick* balancing test and examine the school administration's evidence as to the necessity of its restriction of her speech. But, on this record, we could hardly conclude that school administrators had demonstrated that they reasonably believed Boring's speech would disrupt the workplace. They have not even asserted, let alone offered evidence of, disruption. *Cf. Connick*, 461 U.S. at 151-54. (Supreme Court relies on trial testimony of employer that employee's speech caused office disruption). Accordingly, even under *Connick*, we would be required to hold that the district court erred in dismissing Boring's complaint.

III.

As recognized at the outset of this dissent and in the panel opinion, school administrators must "be permitted to have the final say in setting the appropriate curriculum so that students are not exposed to material that detracts from or impedes the school's pedagogical mission." *Boring* 98 F.3d at 1438. Yet, the First Amendment lives in the classroom as it does elsewhere. Indeed, as the Supreme Court stated several decades ago:

> The vigilant protection of constitutinal freedoms is nowhere more vital than in the community of American schools. By limiting the power of the States to interfere with freedom of speech and freedom of inquiry and freedom of association, the Fourteenth Amendment protects all persons, no matter what their calling. But, in view of the nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, and of action upon thought, in the case of

> teachers brings the safeguards of those amendments vividly into operation.

Shelton v. Tucker, 364 U.S. 479, 487 (1960) (internal quotation omitted). Justice Stewart wrote these words in the course of holding that the First Amendment prevented public schools from compelling teachers to list all organizations to which they had belonged or contributed in the recent past. But the words apply with equal force here. Rather than "vigilant[ly] protecti[ng] . . . constitutional freedoms . . . in the community of American schools," the majority eliminates *all* constitutional protection for the in-class speech of teachers. By holding that public school administrators can constitutionally discipline a teacher for in-class speech without demonstrating, or even articulating, some legitimate pedagogical concern related to that discipline, the majority extinguishes First Amendment rights in an arena where the Supreme Court has directed they should be brought "vividly into operation." For these reasons, I must respectfully dissent.

Judges Hall, Murnaghan, Ervin, Hamilton, and Michael join in this dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 95-2593

MARGARET BORING,
Plaintiff-Appellant,
v.

THE BUNCOMBE COUNTY BOARD OF EDUCATION; CHARLES JOHNSON, Chairman; MICHAEL ANDERS; TERRY ROBERSON; BRUCE GOFORTH; BILL WILLIAMS; GRACE BRAZIL; WENDELL BEGLEY; DR. J. FRANK YEAGER, Superintendent; FRED IVEY, Principal; each in his/her individual and official capacity,
Defendants-Appellees.

Appeal from the United States District Court
for the Western District of North Carolina, at Asheville
Lacy H. Thornburg, District Judge
(CA-93-230)

Argued: May 7, 1996
Decided: October 31, 1996

Before WIDENER, MURNAGHAN, and MOTZ, Circuit Judges.

OPINION

DIANA GRIBBON MOTZ, Circuit Judge:

In this case, a high school drama teacher appeals the dismissal of her complaint for failure to state a claim. The district court determined from the face of the teacher's complaint that the First Amendment did not protect her conduct in selecting, producing, and directing a play that her drama students performed. Although the First Amendment affords a teacher only limited refuge in this context, we conclude that it does not leave a teacher so completely without protection that her complaint failed to state a claim. Accordingly, we reverse and remand for further proceedings.

I.

Because this case was dismissed for failure to state a claim, we must accept the following facts, as alleged in the plaintiff's complaint, as true. *See Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *Advanced Health-Care Servs., Inc. v. Radford Community Hosp.*, 910 F.2d 139, 143 (4th Cir. 1990).

During the 1991-92 school year, Margaret Boring was employed as a teacher of English and Drama at the Charles D. Owen High School in Buncombe County, North Carolina. The County had employed Boring as a teacher since 1979 and, in that time, she had "built a national reputation for excellence in teaching drama and directing and producing therater." Plays she produced won numerous awards and many of her students received theater-related scholarships to college, including $260,000 in awards to 1992 graduates.

In the fall of 1991, Boring chose "Independence" as the play for four student-actresses in her advanced acting class to perform. "Independence" is a drama that "powerfully depicts the dynamics within a dysfunctional, single-

parent family—a divorced mother and three daughters; one a lesbian, another pregnant with an illegitimate child." The students planned to perform the play, under Boring's direction, in a state competition. After selecting the play, Boring notified the school principal, as she did every year, of her choice. The principal, Fred Ivey, did not comment or react.

Before rehearsals began, Boring sent the four student-actresses home with scripts to discuss the play with their parents. None of their parents complained, then or later, about the content of the play. The students then performed "Independence" in a regional competition, in which the play won seventeen of twenty-one possible awards.

After the regional competition, but before the state finals, controversy erupted. A student-actress in "Independence" spoke enthusiastically about the play during an English class, taught by Donna Wyles. In response to complaints about the tedium of reading plays, the student remarked that plays were best appreciated when performed, rather than read, and suggested that the English class view a scene from "Independence." Wyles approached Boring and asked if the drama students could perform a scene for Wyles' class. Boring agreed, but asked Wyles to ensure that her students obtained permission slips from their parents before the performance. Wyles assented to Boring's request.

The drama students then performed a scene from "Independence" in the English class. Afterwards, a student in the class, who apparently had not obtained his parents' permission to see the performance, described the scene to a parent. The parent complained to Ivey, who asked to see a copy of the script. Upon reading the script, Ivey informed Boring and the student-actresses that they would not be permitted to perform the play in the state finals.

Boring asked Ivey and County School Superintendent Dr. J. Frank Yeager to watch a performance of the play before forbidding its entry in the state finals. They declined, refusing even to permit the students to use the school's theater to perform the play for the students' parents. After the play was performed instead in a parent's home, the parents pleaded with Ivey to reconsider his decision. Ivey relented but insisted that certain scenes be deleted. "Independence" then won second place in the state finals.

On June 2, 1992, Boring received her performance evaluation for the year; she was rated "superior" and "well above standard" in all function areas, including "Interacting in the Educational Environment" and "Performing Non-Instructional Duties." Nevertheless, ten days later, on June 12, Principal Ivey requested Boring's transfer from Owen High School. Superintendent Yeager agreed and approved Boring's transfer to a middle school where she was assigned to teach introductory drama. Boring appealed her transfer to the Board of Education of Buncombe County. After a hearing, the Board denied her appeal and upheld the transfer.

Boring initially filed suit in state court, alleging that the Board members, Ivey, and Yeager, each in their individual and official capacities, (collectively, "the defendants"), violated several of her rights under the state and federal constitutions. Boring asserted that the defendants transferred her "in bad faith and with malice toward [her] over the ideas expressed in the play" and so violated her right to freedom of expression. Boring alleged that the transfer caused her "emotional distress, personal and professional humiliation, . . . bludgeoned her reputation as an educator, and . . . caused her to lose professional opportunities."

Defendants removed the case to federal court and, before filing an answer, moved to dismiss the complaint

for failure to state a claim. A magistrate judge agreed with the defendants and recommended dismissal. The district court accepted the magistrate judge's recommendation and dismissed all of Boring's claims.

Boring only appeals the dismissal of her First Amendment claim, which the district court rejected for two reasons. First, the court held that Boring's selection of a play to produce and direct did not constitute a form of "expression" or "speech" that the First Amendment protected. Second, the court ruled that, even if selecting "Independence" was protectable "speech," the school authorities "had a legitimate interest in curbing such speech," and therefore Boring's selection fell outside any First Amendment protection.

We review *de novo* dismissals for failure to state a claim. *Martin Marietta Corp. v. International Tel. Sat. Org.*, 991 F.2d 94, 97 (4th Cir. 1992). Only if it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief" will we affirm such a dismissal. *Id.* (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

II.

We initially address the two grounds on which the district court based its decision to dismiss Boring's complaint.

A.

First, the district court agreed with the magistrate judge that Boring's complaint did not state a cause of action because she had not alleged that the defendants sanctioned her for ideas *she* expressed, but rather for ideas the *play* expressed. The court thus held that Boring's mere "implicit approval" of the ideas in the play "was not expressive conduct entitled to constitutional protection."

In reaching its conclusion, the district court relied primarily on Judge Milburn's concurring opinion in *Fowler*

v. Board of Education, 819 F.2d 657 (6th Cir.) (Milburn, J., concurring), *cert. denied*, 484 U.S. 986 (1987). Of the three opinions the Sixth Circuit panel issued in *Fowler*, two concluded that the conduct at issue in the case—a teacher's presentation of a film to her class—constituted protectable "expression." *Fowler*, 819 F.2d at 667 (Peck, J., concurring); 819 F.2d at 669 (Merritt, J., dissenting). Judge Milburn reached a different conclusion. After analyzing the film presentation under legal principles applicable to conduct *not* "inherently expressive," he found the teacher's conduct unprotected. *Id.* at 662-64. Largely because the teacher was apparently unaware of the film's content, Judge Milburn concluded that her failure to establish that she intended to convey a particularized message to her class deprived her conduct of First Amendment protection. *Id.* at 663. Judge Milburn's rationale appears inapposite here because nothing in this record suggests that Boring was unaware of the play's content.

Moreover, and more importantly, we disagree with Judge Milburn's analysis in *Fowler*. The legal principles applicable to conduct not "inherently expressive" simply do not apply to a teacher's film presentation or Boring's conduct in selecting, directing, and producing a play. Films, plays, and even "crude street skits," constitute inherently expressive communicative vehicles and, as such, warrant First Amendment protection even if the speaker cannot establish an intent to convey a particularized message. *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386, 391 (4th Cir. 1993); *see also Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 65 (1981) ("motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and drama works, fall within the First Amendment guarantee"). Thus, to state a claim Boring need not establish that she "explicitly approved" the ideas in the play or that she intended to convey a particularized message through her choice of "Independence."

To the extent the district court held that Boring's conduct did not merit protection because she did not express ideas of her own, but only the ideas expressed in the play, the court also erred. The First Amendment's protection extends beyond original expression. As recently as 1995, the Supreme Court explained that the First Amendment protects speech, regardless of whether the speaker originally generates the communication or personally advocates the ideas contained therein:

> [U]nder our precedent, . . . First Amendment protection [does not] require a speaker to generate, as an original matter, each item featured in the communication. Cable operators, for example, are engaged in protected speech activity even when they only select programming originally produced by others. For that matter, the presentation of an edited compilation of speech generated by other persons is a staple of most newspapers' opinion pages, which, of course, fall squarely within the core of First Amendment security, as does even the simple selection of a paid noncommercial advertisement for inclusion in a daily paper. The selection of contingents to make a parade is entitled to similar protection.

Hurley v. Irish-American Gay, Lesbian & Bisexual Group, —— U.S. —— ,——, 115 S. Ct. 2338, 2345-46 (1995) (citations omitted).

Just as selection of the above items constitutes protectable expression, so too a teacher's selection of a play for her class to perform constitutes such expression. *See Webb v. Lake Mills Community Sch. Dist.*, 344 F. Supp. 791 (N.D. Iowa 1972) (teacher's play selection protected); *Cf. Keefe v. Geanakos*, 418 F.2d 359 (1st Cir. 1969) (teacher's selection of a magazine article for an English class protected); *Parducci v. Rutland*, 316 F. Supp. 352 (M.D. Ala. 1970) (teacher's selection of a text protected).

Accordingly, the district court erred in concluding that Boring's play selection was not protectable "expression," and dismissing her complaint on this ground.

B.

The district court alternatively concluded that even if selection of a play constituted a form of expression that could be protected, Boring's choice of "Independence" did not merit protection. The court reached this alternative holding in reliance on the standard articulated in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988). In *Hazelwood*, the Supreme Court held that a school could restrict student speech *if* the restriction was "reasonably related to legitimate pedagogical concerns." *Id.* at 273. Purportedly applying that standard to Boring's complaint, the district court ruled, without elaboration, that defendants had a "legitimate interest in curbing" Boring's conduct in selecting "Independence."

Boring does not challenge the district court's determination that *Hazelwood* supplies the appropriate legal standard in this case; she challenges only the court's application of that standard. Accordingly, for the moment (although we will discuss this issue in detail later), we will assume that *Hazelwood*, which examined *student* speech, also states the appropriate standard for analyzing restrictions on *teacher* classroom speech. The question then becomes whether simply by examining Boring's complaint a court can determine that the defendants' asserted restriction on her speech was "reasonably related to legitimate pedagogical concerns."

The answer is clear: Boring's complaint tells us nothing about the defendants' "legitimate pedagogical concerns" for restricting her speech. A court, therefore, has no basis for determining whether the restriction reasonably related to such concerns; and Boring specifically alleges that it did not.

At present, all we know about the play must be inferred from the limited description contained in the complaint, i.e., "it powerfully depicts the dynamics within a dysfunctional single-parent family—a divorced mother and three daughters, one a lesbian, another pregnant with an illegitimate child." Such a brief description, in and of itslef, cannot establish the play's unsuitability for high school students, or establish that the school's speech restriction necessarily related to legitimate pedagogical concerns. After all, from similar brief descriptions, many of the classics, and even parts of the Bible, might not *appear* suitable for high school students to study or perform. *See, e.g., Judges* 16:17-19 (story of Samson and Delilah); 1 *Kings* 21:8-14 (Jezebel); 2 *Samuel* 11:1 - 12.24 (David and Bathsheba); Giovanni Boccaccio, *Tales from the Decameron* (R. Adlington trans., 1930); Thomas Bullfinch, *Bullfinch's Mythology* (Crowell 1834, reprinted, Harper & Row 1970); Homer, *The Iliad* (Alston H. Chase et al. eds., Little, Brown & Co. 1950); William Shakespeare, *Hamlet* (G.R. Hibbard ed., The Oxford Shakespeare 1987); Sophocles, *Oedipus Rex* (David Grene trans., 1954).

In assessing whether Boring's complaint states a claim, we note that a "motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted." *See* 5A Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure: Civil 2d* § 1357 (1990). It is "only in the unusual case where the complaint on its face reveals some insuperable bar to relief that dismissal under Rule 12(b)(6) is warranted." *Fusco v. Xerox Corp.*, 676 F.2d 332, 334 (8th Cir. 1984) (quotation omitted). This is hardly that "unusual case." Indeed, defendants have not cited, and we have not found, a single instance in which any court has applied *Hazelwood* to dismiss a teacher's complaint for failure to state a claim. Uniformly, courts have required school administrators to establish their legitimate pedagogical concerns either by affidavit or at trial. *See, e.g., Silano v. Sag Harbor Union Free Sch. Dist. Bd.*

of Educ., 42 F.3d 719 (2d Cir. 1994) (case resolved at summary judgment stage), *cert. denied*, 115 S. Ct. 2612 (1995); *Ward v. Hickey*, 996 F.2d 448 (1st Cir. 1993) (jury verdict); *Miles v. Denver Public Schs.*, 944 F.2d 773 (10th Cir. 1991) (summary judgment); *Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991) (same), *cert. denied*, 505 U.S. 218 (1992); *Borger v. Bisciglia*, 888 F. Supp. 97 (E.D. Wis. 1995) (same).

Although defendants may have had legitimate pedagogical reasons for restricting Boring's speech, none has been established on this record. Without any basis for determining the defendants' intent in transferring Boring, other than Boring's allegation that it was done "in bad faith and with malice toward [her] over the ideas expressed in the play," the district court should not have dismissed the complaint on the theory that the asserted restriction necessarily related to legitimate pedagogical concerns.

III.

In apparent anticipation that the district court's grounds for dismissal might not stand, defendants offer two other arguments to support the district court's decision to dismiss the complaint. First, and principally, they argue that the *Hazelwood* standard alone provides an inadequate basis for evaluating Boring's claim.

Defendants maintain that a teacher must initially establish that her speech related to a "matter of public concern" before the burden shifts to school authorities to justify restrictions on that speech. *See Connick v. Myers*, 461 U.S. 138, 150 (1983). To satisfy the "public concern" requirement, the defendants further argue that a teacher must show that she expressed her views in her role as a private citizen, rather than as a government employee. *See Kirkland Northside Indep. Sch. Dist. v. Cooper*, 890 F.2d 794, 798-99 (5th Cir. 1989) (a statement is "of public concern" and protected if "the words or conduct

are conveyed by the teacher in his *role as a citizen* and not in his *role as an employee*"). Thus, because Boring selected the play in her role as a teacher, defendants contend that she cannot possibly satisfy the "public concern" requirement. For the reasons that follow, we believe that these arguments must be rejected.

First, the *Connick* "public concern" analysis simply does not provide a very useful tool when analyzing a teacher's classroom speech. Requiring a teacher to establish that her in-class speech relates to a matter of public concern adds little, except an extra step to the analysis. The fact is, in most instances, the essence of a teacher's role in the classroom, and therefore as an employee, is to discuss with students issues of public concern. *See* Gregory A. Clarick, Note, *Public School Teachers and the First Amendment: Protecting the Right to Teach*, 65 N.Y.U.L. Rev. 693, 702 (1990). Accordingly, most teacher comments fall within the Supreme Court's broad definition of "public concern," which includes speech on "*any* matter of political, social or other concern to the community." *Connick*, 461 U.S. at 146 (emphasis added). Certainly, Boring's choice of "Independence," a play allegedly involving a variety of social themes, meets this criterion. *Cf. Blum v. Schlegel*, 18 F.3d 1005 (2d Cir. 1994) (teacher's comments, including use of hypotheticals in class advocating drug legalization, constituted speech of "public concern").

Moreover, as we noted in *Berger v. Battaglia*, 779 F.2d 992, 998-99 (4th Cir. 1985), *cert. denied*, 476 U.S. 1159 (1986), "[t]he principle that emerges [from *Connick*] is that all public employee speech that by content is within the general protection of the first amendment is entitled to at least qualified protection against public employer chilling action except that which, realistically viewed, is of purely 'personal concern' to the employee—most typically, a private personnel grievance." Whatever may be said about Boring's selection of "Independence," or a teacher's

choice of a film or course material, they hardly appear analogous to private personnel grievances.

Furthermore, we must reject defendants' argument that Boring's "role" in speaking dictates whether she is entitled to First Amendment protection. To accept this argument would mean a teacher lacks *all* First Amendment protection whenever she teaches, because by definition she is then acting in her role as a government employee. *Connick,* upon which defendants so heavily rely, does not support this holding.

In *Connick,* the Supreme Court did not state, let alone hold, that *whenever* government workers speak as "employees," their speech deserves *no* protection. Rather, the Court held that "[w]hether an employee's speech addresses a matter of public concern must be determined by the content, form and context of a given statement, as revealed by the whole record." *Connick,* 461 U.S. at 147-48. Thus, although the Supreme Court has on many occasions remarked on the government's greater ability, as employer rather than sovereign, to restrict speech, *see, e.g., Waters v. Churchill,* —— U.S. ——, ——, 114 S. Ct. 1878, 1886 (1994) (plurality opinion), it has not suggested that the speech of government workers, when speaking as employees, can be restricted without *any* limitation.

Moreover, in view of the importance of the free exchange of ideas in educating our society, such a holding would be particularly ill-advised when the employee is a teacher. The Supreme Court has long recognized that educational institutions occupy a unique place in First Amendment jurisprudence. Hence, the notion that teachers have no First Amendment rights when teaching, or that the government can censor teacher speech without restriction, is "fantastic," *see Scallet v. Rosenblum,* 911 F. Supp. 999 (W.D. Va. 1996), and stands in direct contrast to an imposing line of precedent. *See Tinker v. Des*

Moines Indep. Community Sch. Dist., 393 U.S. 503, 506 (1969) ("the unmistakable holding of this Court for almost 50 years" has been that "First Amendment rights, applied in light of the special characteristics of the school environment are available to *teachers* and students") (emphasis added); *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) (A teacher's freedom of speech is a "special concern of the First Amendment"); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) ("Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our society will stagnate and die."); *Blum*, 18 F.3d at 1012 (First Amendment provides a degree of protection to teacher classroom speech); *Ward*, 996 F.2d at 452 (same); *Miles*, 944 F.2d at 775-77 (same); *Dube v. State Univ.*, 900 F.2d 587, 598 (2d Cir. 1990) (same), *cert. denied*, 501 U.S. 1211 (1991); *Kingsville*, 611 F.2d at 1113 (same); *Minarcini v. Strongsville City Sch. Dist.*, 541 F.2d 577, 582 (6th Cir. 1976) (same); *James v. Board of Educ.*, 461 F.2d 566, 575 (2d Cir. 1972) (same), *cert. denied*, 409 U.S. 1042 (1972); *Keefe*, 418 F.2d at 361-62 (same); *Krizek v. Board of Educ.*, 713 F. Supp. 1131, 1137-43 (N.D. Ill. 1989) (same).

The Supreme Court's often quoted *Keyishian* opinion provides perhaps the most memorable modern articulation of the special role of free speech in educational institutions. In *Keyishian*, the Court held that a statute and regulations requiring teachers to swear that they had never advocated treasonable or seditious acts were unconstitutionally vague. One of the regulations required an annual review of teachers' utterances and acts "*inside* the classroom or out." *Keyishian*, 385 U.S. at 602 (emphasis added). In striking down the provisions, the Court explained:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all

> of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. The classroom is peculiarly the "marketplace of ideas."

Id. at 603 (citations omitted).

Thus, in *Keyishian,* by holding unconstitutional regulations covering teachers' speech both *inside* and outside the classroom, the Supreme Court strongly indicated that teacher in-class speech merits First Amendment protection. *See also Tinker,* 393 U.S. at 506 ("It can hardly be argued that either students *or teachers* shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.") (emphasis added). *Cf. Epperson v. Arkansas,* 393 U.S. 97 (1968) (striking down law forbidding the teaching of evolution on religious establishment grounds); *Meyer v. Nebraska,* 262 U.S. 390 (1923) (striking down law criminalizing teaching in any language other than English based on teacher's due process liberty right to teach).

This circuit, following Supreme Court direction, similarly has indicated that a teacher's in-class speech, although by definition communicated while the teacher acts as an employee, deserves constitutional protection. *See Piver v. Pender County Bd. of Educ.,* 835 F.2d 1076, 1081 (4th Cir. 1987) (a teacher's right to free speech outweighed the school's interest in restricting his speech; we noted specifically that the teacher's use of class time to discuss the issue in question "add[ed] up to an exercise of first amendment rights in which both [the teacher] and the community were vitally interested"), *cert. denied,* 487 U.S. 1206 (1988); *see also Moore v. Gaston County Bd. of Educ.,* 357 F.Sup. 1037 (W.D.N.C. 1973) (in case

involving seventh grade teacher disciplined for his responses' to students questions in class, court ruled in favor of the teacher, noting that a teacher's entitlement to First Amendment protection "is no longer in doubt") (quotation omitted).

In cases pertaining to speech *outside* the classroom, we have also emphasized the special importance of First Amendment rights to teachers. *See Jurgensen v. Fairfax County*, 745 F.2d 868, 880 (4th Cir. 1984) (when analyzing restrictions on government employee speech, the court looks at a spectrum "from university professors at one end to policemen at the other. State inhibition of academic freedom is strongly disfavored") (quoting *Wieman v. Updegraff*, 384 U.S. 183, 195 (1952) (Frankfurter, J., concurring)); *Johnson v. Branch*, 364 F.2d 177, 179-80 (4th Cir. 1966) (en banc) ("[The Supreme Court] has pointed out on numerous occasions the importance of the teaching profession in our democatic society and the necessity of protecting its personal, associational, and academic liberty."), *cert. denied*, 385 U.S. 1003 (1967); *see also Kim v. Coppin State College*, 662 F.2d 1055, 1063-64 (4th Cir. 1981) ("First amendment values should find their purest realization in our schools and universities").

The cases defendants cite for the proposition that teachers have no First Amendment rights when in the classroom stand more for the proposition that teachers may be disciplined for failing to follow school rules, and that teachers do not have the unfettered right to control the school curricula. *See Bradley v. Pittsburgh Bd. of Educ.*, 910 F.2d 1172, 1176 (3d Cir. 1990); *Kirkland*, 890 F.2d at 801. In both of these cases, the school's discipline of the teacher resulted not so much from the content of the speech at issue but from the teacher's failure to comply with school rules. *See, e.g., Kirkland*, 890 F.2d at 801-02 (Although ruling against the teacher, court cautioned that it did not "suggest that public school teachers foster free debate in their classrooms only at their own risk or

that their classrooms must be 'cast with a pall of orthodoxy.' We hold only that public school teachers are not free, under the first amendment, to arrogate control of the curricula." Here, Boring specifically denies that she failed to follow school rules and defendants have yet to prove—or even plead—otherwise. Accordingly, those cases are inapposite.

A fair reading of the relevant case law leads us to conclude that the question is not, and never has been, *whether* teachers have First Amendment rights in the classroom, but *how much* school authorities can legitimately restrict those rights. Striking a balance between the school's role as ultimate arbiter of the school curriculum and the teacher's limited in-class speech rights obviously presents a challenge. We believe the approach set forth in *Hazelwood*, of requiring school authorities to provide a legitimate pedagogical basis for in-class speech restriction, provides the best means of navigating this challenge.

We recognize, of course, that *Hazelwood* directly addressed the free speech rights of students, not teachers. Although the Supreme Court has never held that the *Hazelwood* analysis who applies to teachers, certain dicta in *Hazelwod* support this conclusion. When the Court discussed whether the school newspaper at issue in the case constituted a public forum, it stated that if "no public forum has been created . . . school officials may impose reasonable restrictions on the speech of students, *teachers*, and other members of the school community." *Hazelwood*, 484 U.S. at 267 (emphasis added).

Moreover, the rationale that largely animated *Hazelwood* (relating to the school's right to control certain school-spnsored activities bearing its imprimatur) appears to apply equally well in the context of a teacher's play selection for a school-sponsored drama production. In fact, when discussing whether newspapers could be censored due to the school's interest in not appearing to promote the speech involved, the *Hazelwood* Court referred

to school-sponsored activities such as "publications, *theatrical productions*, [etc.]" as being within that class of activities that the school could restrict. *Id.* at 271. (emphasis added).

Several of our sister circuits have agreed that the *Hazelwood* analysis should apply to teacher speech in the classroom as well as to student speech. The First Circuit adopted the *Hazelwood* approach to assess restrictions on teacher speech after concluding that a teacher's speech in class, like the student newspaper in *Hazelwood*, constitutes part of the school-sponsored curriculum. *Ward*, 996 F.2d at 453. The court concluded that *Hazelwood* placed a proper, "reasonable" limit on teacher's speech in that setting. *Id.*; *see also Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ.*, 42 F.3d 719 (2d Cir. 1994) (applying *Hazelwood* to teacher speech); *Miles v. Denver Public Schs.*, 944 F.2d 773 (10th Cir. 1991) (same). *Cf. Bishop v. Aronov*, 926 F.2d 1066, 1074 (11th Cir. 1991) (applying *Hazelwood* to examine a restriction on a university professor's classroom comments about religion). This limit on teacher speech, like the limit on student speech, ensures that students "learn whatever lessons [an] activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school." *Ward*, 996 F.2d at 452 (quoting *Hazelwood*, 484 U.S. at 271).

Although the *Hazelwood* analysis protects the in-class speech rights to all teachers, school authorities retain the flexibility to place greater restrictions on teacher speech directed at younger students. Younger students' relative lack of maturity and lesser capacity to comprehend complex material make greater restrictions appropriate. *See Webb*, 394 F. Supp. at 799 ("state interest in limiting the discretion of teachers grows stronger . . . as the age of the students decreases").

At the secondary school level, school administrators and school boards must be permitted to have final say in setting the appropriate curricula so that students are not exposed to material that detracts from or impedes the schools' pedagogical mission. *See Board of Educ. v. Pico*, 457 U.S. 853, 863-64 (1982) (plurality).* The fact that school administrators and school boards, rather than teachers, may have ultimate control over the appropriate curricula means that secondary school teachers' First Amendment rights may be constrained to somewhat narrow confines.

But there remains a limited area in which a teacher's in-class speech, even in secondary schools, retains protection. In fulfilling her function of expressing ideas to students (all day, everyday), a high school teacher almost inevitably will mention some topics, and choose some teaching materials that will be perceived as controversial; as noted earlier, even the classics present some controversial themes. Cognizant of the difficulty a teacher faces in selecting course material and subjects devoid of potentially controversial material, several courts have emphasized the importance of prior notice to the teacher before her speech may subject her to discipline. *See Ward*, 996 F.2d at 453

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* Thus, contrary to the suggestion of our dissenting colleague, we unequivocally hold that school administrators, rather than teachers, have final authority to select curriculum. We part ways with the dissent in its view that every curriculum choice administrators make necessarily involves "legitimate pedagogical concerns." If school administrators prohibited the teaching of foreign languages solely because they hated foreigners, this would certainly be a curriculum choice, but hardly one based on legitimate pedagogical concerns. The very fact that the Supreme Court in *Hazelwood* held that administrators do not offend the First Amendment in controlling curriculum "*so long as* their actions are *reasonably related to legitimate* pedagogical concerns," 484 U.S. at 273, (emphasis added), strongly indicates that the Court believed some curriculum choices would *not* meet these requirements. Here the administrators may have had legitimate pedagogical concerns, which were reasonsonably related to their actions, however, unlike the administrators in *Hazelwood* or *Kirkland*, they have yet to articulate such concerns.

("Even if a school may prohibit a teacher's statements before she makes them, . . . it is not entitled to retaliate against speech that it never prohibited"). *See also Stachura v. Truszkowski*, 763 F.2d 211, 215 (6th Cir. 1985) (emphasizing importance of prior notice), *rev'd on other grounds*, 477 U.S. 299 (1986); *Moore*, 357 F. Supp. at 1040-41 (same); *Webb*, 344 F. Supp. at 801 (same); *Mailloux v. Kiley*, 323 F. Supp. 1387, 1392 (D. Mass.) (same), *aff'd*, 448 F.2d 1242 (1st Cir. 1971). In this case, we need not teach the question of *what* notice school authorities must provide before disciplining a teacher, *see infra* part V, but we recognize that some notice would appear necessary to ensure that secondary school teachers' limited First Amendment rights have "breathing space to survive." *See Keyishian*, 385 U.S. at 604.

In sum, we believe that *Hazelwood* provides the proper standard for analyzing restrictions on teacher speech in secondary school classes, including the selection of plays for high school drama classes. The district court thus properly chose to employ the *Hazelwood* standard; our disagreement with the district court lies only with its application of that standard.

IV.

Finally, defendants argue that Boring's complaint merits dismissal because she has not alleged that they deprived her of a valuable government benefit. Boring alleged that in addition to causing her emotional distress, "personal and professional humiliation," and loss of reputation, her transfer from a high school where she taught advanced drama in a nationally recognized program to a junior high school where she could only teach introductory drama, caused her to lose "professional opportunities." Defendants point out, however, that Boring has not alleged that her transfer resulted in a decrease in salary or other financial benefits.

In *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990), the Supreme Court addressed the precise question of whether a decision to transfer an employee, without decreasing pay or benefits, could provide the basis for a First Amendment claim. One of the plaintiffs in *Rutan* alleged that he had been denied a transfer to a position closer to his home in retaliation for his political affiliation. *Id.* at 67. He did not assert that the position paid more salary or benefits, involved greater responsibility, or even provided more professional opportunities—just that it was closer to home. *Id.* In its decision, the Supreme Court expressly held that complaints alleging retaliatory actions relating to "promotions, *transfers*, and recalls after layoffs" adequately stated First Amendment claims. *Id.* at 75. (emphasis added).

Circuit precedent, even prior to *Rutan*, similarly regarded a transfer as a sufficient basis for a First Amendment claim. *See, e.g., Piver*, 835 F.2d at 1076 (school board's transfer decision, which the school allegedly rescinded only after the teacher signed a statement supporting a new principal, provided an adequate ground for a First Amendment claim); *Allen v. Scribner*, 812 F.2d 426, 434 n.16 (9th Cir. 1987) ("[A] tranfer traceable to speech-related activity is properly the subject of first amendment challenge, even though the transfer result[s] in no loss of pay, seniority, or other benefit") (quoting *Hughes v. Whitmer*, 714 F.2d 1407, 1421 (8th Cir. 1983), *cert. denied*, 465 U.S. 1023 (1984)); *McGill v. Board of Educ.*, 602 F.2d 774, 780 (7th Cir. 1979) (because a transfer in retaliation for speech can provide the basis for a First Amendment claim, jury verdict for teacher upheld). *Cf. Huang v. Board of Governors of U.N.C.*, 902 F.2d 1134, 1139-40 (4th Cir. 1990) (rejecting district court's conclusion that a professor's transfer could not support a claim but affirming dismissal based on insufficient evidence of causation).

DiMeglio v. Haines, 45 F.3d 790 (4th Cir. 1995), is not to the contrary. Indeed, in *DiMeglio* we acknowl-

edged the *Rutan* holding, but concluded that by 1990 neither we nor the Supreme Court had held "that an employment action less onerous than those" addressed in *Rutan* "amounted to a constitutional deprivation." *Id.* at 806. Since the plaintiff in *DiMeglio* had not alleged that he was transferred, but only that he was "reassigned" "to a geographic subset of the very region from which he formerly had derived his zoning assignments," we held that the district court erred in not holding the defendant employer entitled to a qualified immunity. *Id.* at 806-07. Because Boring has alleged that she was *transferred* in retaliation for protected conduct, *DiMeglio*'s limited holding does not apply and *Rutan* dictates our conclusion that she has adequately stated a claim.

V.

Like the defendants, Boring also offers an alternative argument. She conteds that even if the district court correctly determined from her complaint alone that the defendants' reasons for restricting her speech related to legitimate pedagogical concerns, the district court still erred in dismissing her complaint because school authorities failed to provide her with proper notice before disciplining her. Boring maintains that since she was not on notice that her choice of "Independence" could result in discipline (indeed, she asserts facts indicating that defendants affirmatively misled her into believing her play selection had been approved), the defendants could not proscribe her conduct after it had occurred. In response, defendants argue that Boring did have notice and that, in any event, she has failed to raise properly her notice argument in this appeal. Because we have held that the district court erred in dismissing Boring's complaint at this early stage, we need not address Boring's alternative argument at this time.

For the foregoing reasons, we reverse the order of the district court dismissing Boring's complaint for failure to

state a claim and remand the case for further proceedings consistent with this opinion.

REVERSED AND REMANDED

WIDENER, Circuit Judge, dissenting:

I respectfully dissent. Judge Thornburg delivered an excellent opinion, and I would affirm the judgment entered upon it.

I.

I note that the only question in the case is whether Mrs. Boring had a First Amendment right violated. Slip, p. 4-5. If she has stated a violation of a First Amendment right, she may be entitled to some relief; if she has not so stated a violation of a First Amendment right, there may be no relief granted.

II.

In connection with her claimed violation of a right under the First Amendment, a restatement of the few essential facts and Mrs. Boring's position is appropriate.

Mrs. Boring was a teacher in the Charles D. Owen High School in Buncombe County, North Carolina. In the fall of 1991, she chose *Independence* as the play for four student actresses to perform. After the play was performed in a regional competition, upon a parent's complaint, the school principal, Fred Ivey, informed Mrs. Boring that she and the students would not be permitted to perform the play in state competition. After a review of the play by Ivey and the superintendent of schools, Frank Yeager, Ivey relented and permitted performance of the play in the state competition, but with certain scenes deleted. In June 1992, Ivey requested Mrs. Boring's transfer from Owen High School, which was granted, at no loss of pay, and Mrs. Boring was transferred to a middle school. The county board of education, after a hearing for Mrs. Boring, approved the transfer over Mrs. Boring's protest. It is the transfer that Mrs. Boring com-

plains violated her constitutional rights. She says her transfer was ". . . over the ideas expressed in the play [1] and so violated her right to freedom of expression." [2] Slip, p. 4.

III.

The district court held:

> Since Plaintiff has not engaged in protected speech, her transfer in retaliation for the play's production did not violate constitutional standards.

The majority relies on the authority of *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 63 U.S.L.W. 4625 (June 19, 1995), which it construed as giving First Amendment protection to "speech, regardless of whether the speaker originally generates the communication or personally advocates the ideas contained therein . . . ." Slip, p. 6-7. (Giving as examples cable television operators, presentation of speech generated by other persons in opinion pages, etc.).

The majority held:

> Just as selection of the above items constitutes protectable expression, so too a teacher's selection of a play for her class to perform constitutes such expression.

Slip, p. 7.[3]

On that basis, the majority then stated the question and answer:

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[1] Quotation mark omitted.

[2] Mrs. Boring's transfer may have been due to her damaging a brand new maple floor, but I will assume as she claims, it was because of her claim to be able to select *Independence*, despite the principal and superintendent of schools.

[3] The majority relies on *Keefe v. Geanakos*, 418 F.2d 359 (1st Cir. 1969), for this proposition. But *Keefe*, of course, was pre-*Hazelwood*.

> The question then becomes whether simply by examining Boring's complaint a court can determine that the defendants' asserted restriction on her speech was "reasonably related to legitimate pedagogical concerns."
>
> The answer is clear: Boring's complaint tells us nothing about the defendants' "legitimate pedagogical concerns" for restricting her speech. A court, therefore, has no basis for determining whether the restriction reasonably related to such concerns; and Boring specifically alleges that it did not.

Slip, p. 8.

The majority then adopted what it called the approach in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988): "We believe the approach set forth in *Hazelwood*, of requiring school authorities to provide a legitimate pedagogical basis for in-class speech restriction, provides the best means of navigating this challenge." Slip, p. 14 (referring to a teacher's in-class speech rights).

It reversed the district court for the sole reason that ". . . the district court should not have dismissed the complaint on the theory that the asserted restriction necessarily related to legitimate pedagogical concerns." Slip, p. 9.

IV.

The difficulty with, and I assert the basic error in, the majority decision is that it finesses the central issue in the case: does a teacher have a First Amendment right to select a play which is a part of the curriculum of the school, or do the school authorities have that right?

At this point, it is well to note what is not before the court. The district court held against Mrs. Boring on her federal due process claim based on deprivation of property because of her transfer; on her federal liberty interest claim because of her transfer and public speculation grow-

ing out of her transfer; on her state claim for violation of free speech; on her state claim for deprivation of due process on account of her transfer; and on her state claim for deprivation of liberty interest. These rulings are not appealed.

The majority correctly notes that Mrs. Boring "only appeals the dismissal of her First Amendment claim." Slip, p. 4. The district court noted that "[t]he issue here is whether Plaintiff's selection and production of the play was protected speech." And the majority agrees: "a teacher's selection of a play for her class to perform constitutes such [First Amendment protected] expression." Slip, p. 7.

So the question before us is only whether the selection of the play *Independence* by Mrs. Boring is protected by the First Amendment.[4]

V.

I begin my discussion with the definition of curriculum:

> 3: all planned school activities including besides courses of study, organized play, athletics, dramatics, clubs, and home-room program.

Webster's Third New International Dictionary, 1971, p. 557.

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[4] The essential flaw in the majority's decision is illustrated by the footnote on pages 15-16 of the slip opinion which *states* that it holds that "school administrators, rather than teachers, have final authority to select curriculum." The majority decision, however, *holds* that "a teacher's selection of a play for her class to perform constitutes such [First Amendment] expression." Slip, p. 7. That this latter statement is the *holding* of the majority, despite the denial in the footnote I have mentioned, is unequivocally shown by the last two words of the majority opinion: *"REVERSED AND REMANDED."*

Much of such internal inconsistency is doubtless due to the majority's application of any right a student may have to express himself in the classroom with respect to a curriculum made up by school authorities, to a teacher's claimed right to define for the classroom the curriculum itself.

Hazelwood was a case in which the high school principal edited out of a student newspaper two pages on account of their content. The offending stories related to pregnant students and an on-going family dispute between the parents of a student. The newspaper was sponsored by the school, which paid for its printing. The revenue from sales of the paper amounted to about one-fourth of the cost of publishing the paper. The paper was part of a Journalism II course taught by a faculty member who supervised its preparation. Proofs were given to the principal for his approval before printing. The Court held that the newspaper was a part of the adopted curriculum of the school. The suit was instituted by several student staff members of the newspaper who maintained that they had a right under the First Amendment to prevent the principal from deleting the stories with respect to pregnancy and the family quarrel. The Court sustained the principal.

In arriving at its decision, the Court distinguished the question in the cases which require a school to tolerate certain student speech from the question of whether the First Amendment requires the school to affirmatively promote certain student speech. In this connection, in holding that the newspaper was in the second category, the Court stated:

> The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences [footnote omitted].

Hazelwood, 484 U.S. at 271.

Thus, although *Hazelwood* did not concern a play, rather a newspaper, and did not concern teachers' speech, rather students', it did define a "theatrical production[] . . . that students, parents and members of the public might reasonably perceive to bear the imprimatur of the school" as a "part of the school curriculum." Not only is the Court's definition consistent with *Webster*, I suggest we discount it at our peril.

VI.

With these thoughts in mind, the majority decision is, in my opinion, in error for two equally valid but related reasons.

A.

Mrs. Boring's selection of the play *Independence*, and the editing of the play by the principal, who was upheld by the superintendent of schools, does not present a matter of public concern and is nothing more than an ordinary employment dispute. That being so, Mrs. Boring has no First Amendment rights derived from her selection of the play *Independence*.

In a case following and relying on *Hazelwood* on facts so near to those in the case at hand as to be indistinguishable, the Fifth Circuit came to the conclusion I have just recited in *Kirkland v. Northside Independent School District*, 890 F.2d 794 (5th Cir. 1989), *cert. denied*, 490 U.S. 926 (1990). *Kirkland* was a case in which the employment contract of a high school history teacher was not renewed. He alleged the nonrenewal was a consequence of his use of an unapproved reading list in his world history class. The high school had provided the teacher with a supplemental reading list for his history class along with a copy of the guidelines used to develop and amend that list. He was aware of the guidelines and understood that if he was dissatisfied, a separate body of reading material could be used in his class if he obtained administrative approval. The teacher, however, used his

own substitute list and declined to procure the approval of the schol authorities for his substitute list. The authorities at his high school then recommended that his contract not be renewed at the end of the next academic year, which was affirmed by the board of trustees, much like Mrs. Boring's transfer was affirmed by the school board in this case after a recommendation by the administrative authorities.

The court held that to establish his constitutional claim, Kirkland must have shown that his supplemental reading list was constitutionally protected speech; not different from Mrs. Boring's selection of the play *Independence* in this case. It went on to hold that under *Connick v. Myers*, 461 U.S. 138 (1983), the question of whether a public employee's speech is constitutionally protected depends upon the public or private nature of such speech. It decided that the selection of the reading list by the teacher was not a matter of public concern and stated that:

> Although, the concept of academic freedom has been recognized in our jurisprudence, the doctrine has never conferred upon teachers the control of public school curricula. [footnote omitted]

890 F.2d at 800. And the *Kirkland* court recognized that *Hazelwood* held that public school officials, consistent with the First Amendment, could place reasonable restrictions upon the subject matter of a student published newspaper and also that schools are typically not public forums.

The court stated that "[w]e hold only that public school teachers are not free, under the first amendment, to arrogate control of curricula," 890 F.2d at 802, and concluded as follows:

> In summary, we concluded that Kirkland's world history reading list does not present a matter of public concern and that this case presents nothing more than an ordinary employment dispute. Accordingly,

> Kirkland's conduct in disregarding Northside's administrative process does not constitute protected speech . . . .

890 F.2d 802.

Since Mrs. Boring's dispute with the principal, superintendent of schools and the school board is nothing more than an ordinary employment dispute, it does not constitute protected speech and has no First Amendment protection, I submit. Her case is indistinguishable from Kirkland's.

B.

Even accepting, for argument only, the decision of the majority that Mrs. Boring's selection of the play *Independence* was accorded some kind of First Amendment protection, it also erred in holding that district court erred in holding that "the asserted restriction [of Mrs. Boring's selection] necessarily related to legitimate pedagogical concerns."

Pedagogical is defined as "2: of or relating to teaching or pedagogy. EDUCATIONAL." *Webster's Third New International Dictionary,* 1971, p. 1663.

There is no doubt at all that the selection of the play *Independence* was a part of the curriculum of Owen High School.

The makeup of the curriculum of Owen High School is by definition a legitimate pedagogical concern. Not only does logic dictate this conclusion, in only slightly different context the Eleventh Circuit has so held as a matter of law: "Since the purpose of a curricular program is by definition 'pedagogical' . . ." *Searcey v. Harris,* 888 F.2d 1314, 1319 (11th Cir. 1989).

If a play which is to be performed under the auspices of a school and which is a part of the curriculum of the school, is not by definition a legitimate pedagogical concern, I submit that nothing could be.

So, in my opinion, the majority erred in reversing the district court for its holding to that effect.

VII.

In a more general vein, I do not know of a more significant case to be decided in this court in my experience. The question is who is to set the curriculum, the teachers or the school authorities. Who is to first influence young minds?

From Plato to Burke, the greatest intellects of Western civilization have acknowledged the importance of the very subject at hand and have agreed on how it should be treated.

> For a young person cannot judge what is allegorical and what is literal; anything that he receives into his mind at that age is likely to become indelible and unalterable; and therefore it is most important that the tales which the young first hear should be models of virtuous thoughts.

Plato's *Republic: Book II*, Jowett Translation, Walter J. Black, Inc., 1942, p. 281.

> The magistrate, who in favor of freedom thinks himself obliged to suffer all sorts of publications, is under a stricter duty than any other well to consider what sort of writers he shall authorize, and shall recommend by the strongest of all sanctions, that is, by public honors and rewards. He ought to be cautious how he recommends authors of mixed or ambiguous mortality. He ought to be fearful of putting into the hands of youth writers indulgent to the peculiarities of their own complexion, lest they should teach the humors of the professor, rather than the principles of the science.

Letter to a Member of the National Assembly (1791). IV, 23-34, found in *The Philosophy of Edmund Burke*, University of Michigan Press, 1960, p. 247.

No matter who sets the curriculum of a school, the younger the student the more especially my complaint should apply. That the curriculum of the school has an influence on young minds may not be exaggerated. The question is who shall set the curriculum, teachers who are responsible only in the most remote sense, or school authorities who are responsible in the sense that in the last analysis they must answer to political authorities because of the saving aspect of Art. IV, Sec. 4 of our Constitution which provides that each State must have a republican form of government. The argument may be that young minds are better in the hands of teachers who are regulated only by the First Amendment and by federal judges who are appointed during good behavior and are not responsible in any sense except by way of impeachment to the public which they serve. But I believe that is not so, young minds are better served by local school authorities with input from parents.

The Fifth Circuit recognized just this problem in *Kirkland* stating:

> It does not matter, for purposes of influencing young minds, whether such power is exercised, to the exclusion of others, by the government or public school teachers.

890 F.2d at 801.

I agree with Justice Frankfurter, in concurrence, who related the four essential freedoms of a university, which should be no less obtained in public schools unless quite impracticable or contrary to law:

> It is an atmosphere in which there prevail 'the four essential freedoms' of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.

Sweezy v. New Hampshire, 354 U.S. 234, 255, 263-264 (1957) (quoting from a statement of a conference of senior scholars from the University of Cape Town and the University of the Witwatersrand, including A. v. d. S. Centlivres and Richard Feetham, as Chancellors of the respective universities [footnote omitted]).

In conclusion, I do not think the majority will take issue with the fact that someone has to set the curriculum for public schools. In my opinion, the curriculum should be set by the local administrative authorities and not the teachers. This is a business federal judges should keep out of absent a constitutional imperative not present here.

APPENDIX C

[Filed June 1, 1995]

IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
ASHEVILLE DIVISION

Civil No. 1:93CV230

MARGARET BORING,

Plaintiff,

vs.

THE BUNCOMBE COUNTY BOARD OF EDUCATION; CHARLES JOHNSON, Chairman; MICHAEL ANDERS; TERRY ROBERSON; BRUCE GOFORTH; BILL WILLIAMS; GRACE BRAZIL; WENDELL BEGLEY; DR. J. FRANK YEAGER, Superintendent; and FRED IVEY, Principal, each in his/her individual and official capacity,

Defendants.

MEMORANDUM AND ORDER

THIS MATTER is before the Court on the Plaintiff's objections to the Memorandum and Recommendation of Chief United States Magistrate Judge J. Toliver Davis. Pursuant to 28 U.S.C. § 636 and the standing Orders of Designation, this Court referred the Defendants' Motion to Dismiss Amended Complaint to the Magistrate Judge for a recommendation as to disposition. Magistrate Judge Davis filed his Memorandum and Recommendation on May 16, 1994, recommending that the Defendants' mo-

tion be granted and the action be dismissed. Plaintiff timely filed objections and the parties filed the following additional pleadings: a) Defendants' Response to Plaintiff's Objections to Memorandum and Recommendation, filed June 24, 1994; b) Plaintiff's Response to Defendants' Response to Plaintiff's Objections to Memorandum and Recommendation, filed July 5, 1994; and c) Defendants' Objection to Plaintiff's Response to Defendants' Response to Plaintiff's Objections to Memorandum and Recommendation, filed August 2, 1994.

For the reasons stated below, the Court adopts the Memorandum and Recommendation as amended.

I. STANDARD OF REVIEW

The Court conducts a *de novo* review of those portions of the Memorandum and Recommendation to which objections have been filed. 28 U.S.C. § 636(b). Plaintiff has objected to both the factual findings and legal conclusions.

Defendants have moved to dismiss the complaint for failure to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6). "In considering the propriety of a Rule 12(b)(6) dismissal, the standard of review is whether the complaint, accepting the allegations as true, allows a recovery." *Waterford Citizens' Ass'n v. Reilly,* 970 F.2d 1287, 1290 (4th Cir. 1992). "A motion to dismiss for failure to state a claim for relief should not be granted unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim." *Fitzgerald v. Mannington Carpets,* 1994 U.S. Dist. LEXIS 10548 at *3 (D. Md. July 12, 1994) (citing *Johnson v. Mueller,* 415 F.2d 354, 355 (4th Cir. 1969)).

> To survive a motion under Rule 12(b)(6), a complaint need only outline a recognized legal or equitable claim which sufficiently pinpoints the time, place,

> and circumstances of the alleged occurrence and which, if proven, will justify some form of relief. Thus, a complaint should not be dismissed merely because the plaintiff's allegations do not support the particular legal theory advanced; the court will examine the allegations to determine whether they call for relief on any possible theory.

Shepard's, *Motions in Federal Court*, § 5.123 (2d ed. 1991). "Because a dismissal under Rule 12(b)(6) is accorded res judicata effect, such dismissals are generally disfavored by the courts." *Fayetteville Investors v. Commercial Builders, Inc.*, 936 F.2d 1462, 1471 (4th Cir. 1991).

II. ALLEGATIONS OF THE AMENDED COMPLAINT

In keeping with the substantive law, the Court will review the allegations of the amended complaint, accepting them as true for the purposes of this motion. *Waterford Citizens' Ass'n, supra.*

Plaintiff is a tenured teacher with the Buncombe County Public Schools and has been continuously employed by the County since 1979. She is a certified high school English teacher with an endorsement in drama.

Plaintiff taught English and drama, including an advanced acting class, at Charles D. Owen High School during the 1991-92 school year. In the Fall of 1991, Plaintiff produced and directed four students in her advanced acting class in the play "Independence" for an annual state-wide competition.

Prior to the production and rehearsals, Plaintiff notified her principal, Defendant Ivey, that she had chosen this play for the competition. Ivey did not comment on the choice or react in any manner. At that time, the school had a controversial materials policy, the purpose of which

was to allow parents to comment on certain materials to which the students might be exposed. Plaintiff sent the play script home with her drama students and received parental consent to the involvement of each student with the play.

The play in question involves themes focusing on the relationships and interactions of a divorced, single mother with her daughters, one of whom is homosexual; the other, pregnant with an illegitimate child. The production won the regional section of the statewide competition, receiving seventeen of the twenty-one awards. Plaintiff and her students continued preparation for the final competition.

During the course of an English class taught by a different teacher, the students complained of the tedium of studying Shakespeare. One of Plaintiff's students suggested that seeing an actual performance would help and invited them to view a scene from "Independence." When approached by the other English teacher, Plaintiff advised her of the themes involved and asked that the students bring in permission slips from their parents. Some students neglected to do so. One student complained to a parent about the subject matter. This prompted a complaint to the principal, Defendant Ivey. At this point, Ivey read the script of the play for the first time and then banned its further production based on the content.

Plaintiff objected to Ivey's decision, since this would prevent the drama students from performing the play in the final state-wide competition. She asked Ivey and the school superintendent, Defendant Yeager, to attend a performance of the play with the parents of the students. Both declined and barred the play's performance at the school. Plaintiff then approached the students' parents whom she enlisted in her support. The play was performed at a student's home after which the parents, along with the Plaintiff, met with Ivey to encourage him to change his mind. Ivey determined to allow the production

to continue on the stipulation that certain portions of the play be deleted. Upon performing the edited version of the play, the students won second place in the state competition.

Prior to these occurrences, the high school had recently moved to a new location. The new building, which is also used by a local community theater, has a stage floor made of maple. Plaintiff discussed with the community theater representative and Ivey the difficulty of using a maple floor for theatrical productions. Ivey suggested using plywood as a temporary covering for the floor.

In March 1992, Plaintiff was about to begin production of the spring performance, a musical, and submitted a request to Ivey for approval of the construction necessary for the sets. Ivey advised that she did not need approval to construct sets, but would if shelves and fixtures were to be erected. Plaintiff asked Ivey to come and view the preparations. A temporary plywood covering was placed over the maple floor. Ivey came to see the preparations, and upon seeing the manner in which the playwood was used complained about the plywood. When it was removed after the musical, there were small holes left in the maple floor. Ivey wrote to an administrator that Plaintiff had damaged the floor maliciously. The floor was repaired.

On June 2, 1992, Plaintiff received her annual performance evaluation in which she was rated "superior" and "well above standard" in all functions areas, including interaction in the educational environment and performing noninstructional duties. On June 12, 1992, Ivey requested an involuntary transfer of Plaintiff to make room for an additional math teacher, citing "personal conflicts resulting from actions she initiated during the course of this school year." Defendant Yeager transferred Plaintiff from her position as English and drama teacher, including an advanced acting class, at Owen High School to a posi-

tion as an introductory drama teacher at Valley Springs Middle School. Plaintiff is not certified to teach in middle school. Yeager justified his transfer by stating that Plaintiff had failed to comply with the controversial materials policy, a policy which was amended to specifically cover theatrical productions after the above controversy arose.

The Board of Education has a policy concerning involuntary transfers within the district which lists criteria for such transfers, including teacher certification and training, teacher preference, seniority of the teacher within the district, the opportunity for professional growth available at the new location and the best interests of the district. Plaintiff claims her involuntary transfer violated these criteria.

Plaintiff had a hearing with the Board of Education in September 1992, in which she appealed the transfer. Prior to the hearing, there had been much public controversy surrounding Plaintiff's transfer, and she had been accused of being immoral because of her choice of the play. Plaintiff does not contend that Defendants or either of them accused her of being immoral for any reason. During the course of the hearing, two board members asked Plaintiff questions which suggested to her that their consideration of evidence and information was gathered outside of the hearing process. The Board upheld the transfer, stating they would consider Plaintiff for the next available high school placement. No promise was made that she would receive the next placement. Since that time, two openings in high school drama positions have become available, but Plaintiff did not receive appointment to either of them.

III. DISCUSSION

Plaintiff sued in this Court pursuant to 42 U.S.C. § 1983, alleging Defendants acted under color of state

law and deprived her of constitutional rights.[1] Specifically, Plaintiff alleges the involuntary transfer was in retaliation for her exercise of the right to free speech; Defendants failed to accord her due process at the hearing; and Defendants violated her right to personal liberty by taking unconstitutional actions which affected her vocation and damaged her personal and professional reputation. Plaintiff also alleges causes of action pursuant to the North Carolina Constitution, claiming violations of her rights to free speech, due process and liberty.

A. Plaintiff's federal First Amendment claim.

Plaintiff's first cause of action is based on a violation of the First Amendment right to free speech. "It is clear that '[a] state may not dismiss a public school teacher because of the teacher's exercise of speech protected by the First Amendment.'" *Hall v. Marion Sch. Dist. No. 2*, 31 F.3d 183, 192 (4th Cir. 1994). The issue here is whether Plaintiff's selection and production of the play was protected speech. For purposes of this motion, the Court accepts as true the allegations of the complaint that Plaintiff sought approval of the play prior to production and that Defendant Yeager thereafter justified her transfer by claiming that she violated the school's controversial materials policy.

Plaintiff does not ask the Court to find that a unilateral selection and production of the play "Independence," without prior approval, would have been protected First Amendment speech. The play was part of the school curriculum and as such, the school had every right, in-

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[1] Plaintiff has asserted four causes of action: 1) a federal cause of action pursuant to 42 U.S.C. § 1983, alleging violations of her constitutional rights to free speech, due process, and liberty; 2) a state cause of action for a violation of her right to free speech; 3) a state cause of action for a violation of her right to due process; and 4) a state cause of action for deprivation of her right to liberty.

deed duty, to scrutinize its content prior to exposing the students to it. *Board of Educ., v. Pico*, 457 U.S. 853, 864 (1982). Plaintiff argues that having passed on the play prior to its production and performance, the school does not have a right to discipline Plaintiff in retaliation for its use in the curriculum. This is true only if its selection and production constitute protected speech.

The selection and production of the play was not expressive conduct entitled to constitutional protection. The United States Supreme Court has recognized that some forms of conduct may be expressive or communicative and thus entitled to first amendment protection, but as the Sixth Circuit pointed out in *Fowler v. Bd. of Educ.*, 819 F.2d 657 (6th Cir.), *cert. denied*, 484 U.S. 896 (1987):

> [N]ot every form of conduct is protected by the First Amendment right of free speech. . . . "If any sort of conduct that people wish to engage in is to be considered 'speech' simply because those who engage in conduct are, in one sense, necessarily expressing their approval of it, the line between 'speech' protected by the First Amendment and conduct not so protected will be destroyed.

Id., at 662-63 (quoting *Jarman v. Williams*, 753 F.2d 76, 78 (8th Cir. 1985)). While Plaintiff's selection and production of the play might be interpreted as implicit approval of the ideas expressed in the play, it did not constitute "expression" in a constitutional sense.

Even if it is assumed that Plaintiff's conduct was "expression," the allegations of the amended complaint fail to state a claim. The Supreme Court in *Hazelwood School Dist. v. Kuhlmeir*, 484 U.S. 260 (1988), and *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977), dealt with teachers engaging in classroom speech,

as opposed to cases where the teacher was retaliated against for non-classroom public speech.[2]

In *Hazelwood*, the Supreme Court found the publication of a school-sponsored newspaper which was part of the curriculum of a Journalism II class was done in a non-public forum; thus, the school could limit the students' first amendment rights of expression in that paper as long as it was reasonably related to legitimate "pedagogical" concerns. *Hazelwood, supra.* In *Mt. Healthy*, the Supreme Court ruled that when a teacher has engaged in protected speech, and that speech was a motivating factor in terminating the teacher, the school may rebut the showing by bringing forth evidence that it would have discharged the teacher in any event. *Mt. Healthy, supra.*

Here the teacher's speech occurred in a non-public forum, like the teachers in *Hazelwood* and *Mt. Healthy*. The determination of "whether the employee is speaking out as a citizen, upon matters of public concern, or as an employee, upon matters only of personal interest" is inapplicable on these facts. *Id.* at 192. The Fifth Circuit recently addressed a case where the teacher substituted his own supplemental reading list, without prior approval, for that which had been supplied by the school district as part of its curriculum. *Kirkland v. Northside Independent School Dist.*, 890 F.2d 794, 795, 801 (5th Cir. 1989), *cert. denied*, 496 U.S. 926 (1990). Indeed, the court in *Kirkland* cited the *Hazelwood* analysis, stating "[s]ince schools are typically not public forums, restrictions upon speech can be imposed in public schools as long as the constraints are 'reasonably related to legitimate pedagogical concerns' ". *Id.* at 801 (citations omitted).

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[2] However, the Court does not find that Plaintiff's speech outside of school to parents, urging them to resist the banning of the play constituted expression on a matter of public concern made by the Plaintiff in her capacity as a private citizen. *Hall, supra.* Plaintiff acted as a teacher in this role.

The Eleventh Circuit also has followed the *Hazelwood* approach in cases involving a teacher's speech within the classroom. In *Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991), *cert. denied sub nom., Bishop v. Delchamps*, —— U.S. ——, 112 S. Ct. 3026 (1992), the Circuit found that a professor's statements in the classroom about his Christian approach to life constituted speech in a non-public forum and the University reasonably restricted his statements, thus not infringing on his First Amendment rights. *Id.* at 1074.

The Tenth Circuit provides guidance in the resolution of a case involving classroom speech, citing the "significant interests of the state as educator." *Miles v. Denver Public Schools*, 944 F.2d 773, 777 (10th Cir. 1991). "These responsibilities warrant application of the standard adopted in *Hazelwood* for reviewing regulation of classroom speech rather than the *Pickering* [*Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968)] standard for reviewing regulation of speech in a more general public setting. . . . [W]e distinguish between teachers' classroom expression and teacher's expression in other situations that would not reasonably be perceived as school-sponsored." *Id.* Application of these cases and the *Hazelwood* standard here shows that Plaintiff's selection and production of the play did not constitute protected speech. However, even if it did, the school had a legitimate interest in curbing such speech. Since Plaintiff has not engaged in protected speech, her transfer in retaliation for the play's production did not violate constitutional standards.

B. Plaintiff's federal due process cause of action.

The Magistrate Judge concluded that Plaintiff's cause of action based on due process failed to state a claim. This Court agrees that Plaintiff has no claim for violation of due process rights based on a deprivation of property because her tenure as a teacher only gives her an interest in continued employment, not in a specific position. Thus,

a transfer where she sustains no pay reduction does not qualify as a demotion invoking property rights. N.C. Gen. Stat. § 115C-325.

C. Plaintiff's federal liberty interest cause of action.

The right to liberty guaranteed in the Fourteenth Amendment extends to an individual's right to engage in an occupation. *Board of Regents v. Roth*, 408 U.S. 564, 572 (1972). "[W]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." *Id.* Under the standard set forth in *Bishop v. Wood*, 426 U.S. 341 (1976), *overruled on other grounds, Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985), a private communication with an employee concerning his termination does not state a claim because his reputation is not impaired in a public manner. Here, Defendant Yeager stated the reason for Plaintiff's transfer was her failure to comply with the controversial materials policy. Apparently this reason was the subject of her hearing before the Board. Plaintiff has alleged that the involuntary transfer occurred amid public speculation about her own morality and as a result of a hearing at which such speculation was not excluded. The result, she claims, is that she has been deprived of certain occupational opportunities and her public as well as private reputation has been injured. The Court does not agree that consideration of such speculation at Plaintiff's hearing before the school board constitutes impairment of her reputation in a public manner. The hearing itself granted Plaintiff notice and an opportunity to be heard.

Nor does Plaintiff's transfer state a liberty interest. "The internal transfer of an employee, unless it constitutes such a change of status as to be regarded essentially as a loss of employment, does not provide the additional loss of a tangible interest necessary to give rise to a liberty interest meriting protection under the due process clause of the fourteenth amendment." *Thomas v. Smith*, 897

F.2d 154, 156 (5th Cir. 1989) (citation omitted). Plaintiff claims that the transfer to a position as an introductory drama teacher has interfered with her professional options and damaged her reputation. However, she has not sustained a reduction in pay. The transfer is not tantamount to a loss of employment.

D. Plaintiff's state cause of action for violation of free speech.

The Court's ruling *supra* that Plaintiff has not engaged in protected expression applies to the state cause of action as well. The Court adopts the Magistrate Judge's alternative Recommendation on this issue. Thus, those claims will also be dismissed.

E. Plaintiff's state cause of action for deprivation of due process.

The Court determined above that Plaintiff does not have a federal cause of action for deprivation of due process because she does not have a property interest stated by virtue of a transfer, as opposed to job termination. For the reasons stated in the Memorandum and Recommendation, Plaintiff does not have a state cause of action based on deprivation of property.

Moreover, Plaintiff failed to exhaust statutorily prescribed administrative and state court remedies prior to initiating court action. Thus, redress in the federal court is not appropriate at this time. *Williams v. New Hanover County Bd. of Education*, 104 N.C. App. 425, 409 S.E.2d 753 (1991).

F. Plaintiff's state cause of action for deprivation of liberty.

For the reasons stated in the Memorandum and Recommendation and this Court's discussion *supra* of the federal cause of action based on deprivation of liberty, the Court

finds that Plaintiff has not stated a separate state cause of action for deprivation of liberty. The Court adopts this portion of the Memorandum and Recommendation.

IV. ORDER

IT IS, THEREFORE, ORDERED that the Defendants' motions to dismiss Plaintiff's causes of action for failure to state claims upon which relief may be granted are hereby GRANTED.

A Judgment dismissing this matter in its entirety will be filed herewith.

THIS the 1st day of June, 1995.

/s/ Lacy H. Thornburg
LACY H. THORNBURG
United States District Court Judge

APPENDIX D

[Filed Jan. 10, 1994]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
ASHEVILLE DIVISION

Case No.: 1:93 CV 230

MARGARET BORING,

Plaintiff,

v.

THE BUNCOMBE COUNTY BOARD OF EDUCATION; CHARLES JOHNSON, Chairman; MICHAEL ANDERS; TERRY ROBERSON; BRUCE GOFORTH; BILL WILLIAMS; GRACE BRAZIL; WENDELL BEGLEY; DR. J. FRANK YEAGER, Superintendent; and FRED IVEY, Principal; each in his/her individual and official capacity,

Defendants.

AMENDED COMPLAINT
(JURY TRIAL REQUESTED)

Now comes the plaintiff, pursuant to Rule 15(a) of the Federal Rules of Civil Procedure and prior to the filing of a responsive pleading by the Defendants, and files the following Amended Complaint.

PRELIMINARY STATEMENT

1. Plaintiff brings this action under the First and Fourteenth Amendments of the United States Constitution, Article I, §§ 1, 14 and 19 of the North Carolina Constitution and 42 U.S.C. § 1983. She complains that her trans-

fer from her position as English and Drama teacher at Charles D. Owen High School (Owen) at the end of the 1991-92 school year, resulting from the production of a scene from the play "Independence" for a statewide drama competition, violated her right to free speech; that in a hearing before the Board of Education in appeal of her transfer, the Board did not give her an impartial hearing and violated her right to due process; and, in so acting, that the Defendants have violated her liberty interest as protected under the state constitution, resulting in injury to her personal and professional reputation.

PARTIES

2. Plaintiff Margaret Boring is a citizen and resident of Buncombe County, North Carolina.

3. Defendant Fred Ivey is a citizen and resident of Buncombe County, North Carolina and serves as Principal of the Charles D. Owen High School, a school unit administered by Defendant Board of Education. Defendant Ivey is sued in his individual and official capacities, as this case includes both federal and state claims.

4. Dr. Frank Yeager is a citizen and resident of Buncombe County, North Carolina and serves as Superintendent of the Buncombe County Public Schools. He is an employee of the Defendant Board of Education. Defendant Yeager is sued in his individual and official capacities, as this case includes both federal and state claims.

5. The Defendant Buncombe County Board of Education is a body corporate charged by statute with general control and supervision of all matters pertaining to the public schools within its administrative unit, and which is capable of prosecuting and defending suits for and against it.

6. On information and belief, all of the Defendant members of the Board are citizens and residents of Buncombe County, North Carolina.

7. All of the Defendant members of the Board are sued in their individual and official capacities, as this case includes both federal and state claims.

8. At all times relevant to the allegations in this complaint, the Defendants have acted under color of state law.

JURISDICTION

9. The plaintiff filed this action in Superior Court and Defendants have removed the case to this federal court on the basis of the federal questions involved.

FACTS

10. Plaintiff is a tenured teacher in the Buncombe County Public Schools who was first employed as a teacher by the Defendant Board of Education in 1979. She is certified in high school English and has an endorsement in Drama.

11. During the 1991-92 school year, the Plaintiff taught English and Drama at Charles D. Owen High School.

12. Plaintiff has built a national reputation for excellence in teaching drama and directing and producing theater. Her plays have won numerous awards and, each year, many of her students have gone on to college on theater-related scholarships, including $260,000 in awards to 1992 graduates.

13. In the fall of 1991, Plaintiff produced and directed four students from her advanced acting class in the play "Independence" for an annual state-wide competition run by the North Carolina Theater Conference (NCTC), a drama consortium of North Carolina colleges and schools. Plaintiff regularly has entered her students in this competition with great success.

14. The play powerfully depicts the dynamics within a dysfunctional, single-parent family—a divorced mother

and three daughters; one a lesbian, another pregnant with an illegitimate child. The play has been acclaimed by critics as a major achievement for its respected author, Lee Blessing.

15. Plaintiff notified Defendant Ivey, as she did every year, that she had chosen "Independenct" as the play for the annual competition; Ivey did not comment or react.

16. Before rehearsals began, Plaintiff sent the four students home with the scripts to discuss the play with their parents. At no time in the controversy that arose over the play did the parents of the student actresses complain to Ms. Boring's about her conduct or the content or style of the play. When Defendants Ivey later attempted to cancel the play, the parents intervened and protested his decision, urging him to allow their children to perform the play.

17. The play won a regional section of the NCTC competition, taking seventeen of twenty-one awards, including Best Actress, Best Ensemble Performance and Best Director. But before the play went to the state finals, controversy erupted.

18. During the course of practicing and performing the play, one of the actresses spoke enthusiastically about it in her English class, taught by Ms. Donna Wyes. Ms. Wyles' students were studying Shakespeare. There were many complaints about the tedium of reading plays. The student actress responded to the complaining students that plays were best appreciated when acted rather than read. She suggested that the class see the scene from "Independence" performed by her troupe.

19. Mrs. Wyles approached Plaintiff about staging a performance for her classes to watch. Ms. Boring cautioned her about the mature subject matter in the play and suggested that the students should bring in parental permission slips to see it. Mrs. Wyles agreed and assured

Plaintiff that she would make the necessary arrangements. Mrs. Wyles sent home permission slips.

20. On the day that Mrs. Wyles' classes watched the play some students apparently watched without producing the permission slips. On information and belief, one student described the play to a parent and that parent called to complain to Defendant Ivey.

21. Defendant Ivey asked Ms. Boring for a copy of the script. After reading it, he informed her that the students could not perform the play at the state final of the NCTC competition.

22. Boring objected to the decision and invited Defendants Ivey and Yeager to come view the play with the parents of the actresses before censoring it. The Defendants declined the invitation and informed Boring that she could not perform the play for the parents at the school's theater.

23. The students and Boring then staged the play at the home of one of the parents. The parents and Boring then met with Defendant Ivey. The parents urged him that the students handled the play with maturity and that he should not to cancel the show. He relented, but insisted that certain portions of the play be deleted.

24. The students performed the play in the state competition in Greenboro and won second place.

25. After their success there, Plaintiff invited Defendants Ivey and Yeager to come to a special performance of the play, where it would be screened for a national thespian competition. The two Defendants declined and, to this day, none of the Defendants have seen the play.

26. In large part because of the success of the play, all four actresses now attend private colleges on drama scholarships.

27. In the summer of 1991, the Owen High School moved to a new physical facility which had a maple stage floor. At the time of the move, plaintiff discussed with defendant Ivey and a representative of the community theater that also used the facility, the problems in mounting productions on this stage floor. Defendant Ivey suggested the use of plywood as a temporary surface over the maple floor.

28. In March of 1992, Defendant Ivey advised Plaintiff that she needed to obtain his approval before doing any construction work in the auditorium. Prior to the Spring production of the musical "Big River," Plaintiff advised Defendant Ivey that she needed to construct sets on the stage. Defendant Ivey stated that he understood the need for sets and that the memo was intended to deal with the construction of shelves and other fixtures. Defendant Ivey was invited to come to the auditorium to observe preparations for the show.

29. The theater crew then constructed a temporary plywood surface over the stage floor and erected the sets.

30. Ivey did not come to the auditorium until shortly before the play. He then complained about the use of the plywood surface.

31. The play, using students from the high school and members of the community as actors and technical support personnel, was well received in the community.

32. When the plywood floor was removed after the play, there were small screw holes left in the stage floor. Defendant Ivey wrote falsely and accusingly to an administrator that Ms. Boring had "maliciously" damaged the floor.

33. Plaintiff presented Defendant Ivey with a plan for filling the holes and revarnishing the floor. The school architect presented a repair plan almost identical to Plaintiff's proposal. Then, after several months delay, the

original flooring contractor refinished the floor, filling the holes with a mixture of sawdust and polyurethane.

34. On June 2, 1992, Plaintiff received her performance evaluation for the year. She was rated "superior" and "well above standard" in all function areas, including the areas of "Interacting in the Educational Environment" and "Performing Non-Instructional Duties."

35. Nonetheless, on June 12, 1992, Defendant Ivey requested Ms. Boring's transfer from Owen, ostensibly to make room for an additional Math teacher, citing "personal conflicts resulting from actions she initiated during the course of this school year." Defendant Ivey requested the transfer in bad faith and with malice toward Plaintiff over the ideas expressed in the play.

36. Defendant Yeager transferred Plaintiff to an introductory drama position at Valley Springs Middle School.

37. Defendant Yeager, in justification of the transfer, stated that the Plaintiff had failed to follow the school system's controversial materials policy in producing the play. Plaintiff. Defendant Yeager acted in bad faith and with malice toward plaintiff over the ideas expressed in the play.

38. Neither the school nor board policy in effect when "Independence" was produced covered the play. After the controversy arose over the performance of the play in Mrs. Wyles class, the school's policy was amended to cover dramatic presentations.

39. The purpose of that policy is to give the parents some control over the materials to which their children are exposed in school. Here, the parents approved of the students participation in the play.

40. As further evidence that violation of the controversial materials policy was not the reason for the transfer, Defendants did not discipline Mrs. Wyles for

presenting the play to her students, though her action also allegedly violated the policy and caused the controversy.

41. The action also ignored several aspects of the Board's policy on involuntary transfers. That policy lists criteria that clearly do not support the transfer of Ms. Boring, including consideration of the individual's certification and training, the preference of the individual involved, the seniority of the individual in the school system, the opportunity for professional growth available in the new position and the best interests of the school system.

42. None of these factors supported the transfer. Ms. Boring was not certified in Middle School instruction, she preferred high school instruction, she had more seniority than teachers who remained in the English program at Owen, the new position offered no opportunity for professional growth for someone with Plaintiff's skills and interests, and the transfer meant the end of a nationally renowed Drama program that had brought recognition to the school system and scholarship for its students.

43. At a hearing before the Board of Education on September 2, 1992, Plaintiff appealed the decision of the Superintendent. Prior to the hearing, there was considerable public discussion of the transfer, including accusations that the play was obscene and that Boring was immoral.

44. At the hearing, Plaintiff asked Board members if they would be able to base their review of her appeal solely on the evidence presented to them at the hearing and not on information that had gathered outside of the hearing process, as required by the law; all said that they would.

45. In the course of the hearing, at least two members of the board, Defendants Begley and Goforth, asked questions of Plaintiff that clearly demonstrated consideration

of matters outside of the evidence presented at the hearing.

46. The Defendant Board members, acting in bad faith and with malice toward plaintiff for producing the play, upheld the transfer. The day following the hearing, the Board chair announced that the Board would uphold the move. The action corroborated the public discussion about Plaintiff and damaged her reputation in the community. While the Board acknowledged Plaintiff's success with the Drama program at Owen and "requested" that Plaintiff be given utmost consideration for placement at the high school level, there have been at least two openings in high school drama positions since then for which Plaintiff has received no consideration.

47. The Defendants' transfer of Plaintiff has caused her to suffer emotional distress, personal and professional humiliation, has bludgeoned her reputation as an educator, and has caused her to lose professional opportunities.

FIRST CAUSE OF ACTION

(FREEDOM OF EXPRESSION)

48. The actions of the defendants in transferring Plaintiff served to punish and retaliate against her for expressing controversial ideas through the production of the play. The actions of the Defendants violated Plaintiff's right to freedom of speech as protected by the First and Fourteenth Amendments of the United States Constitution and Articles I, § 14 of the North Carolina Constitution.

49. As a proximate result of the Defendants actions, Plaintiff has suffered loss of professional status and severe emotional damage, including personal and professional humiliation and loss of professional opportunity. She seeks damages in excess of $10,000.

SECOND CAUSE OF ACTION

DUE PROCESS

50. Plaintiff incorporates by reference paragraphs 1-49.

51. Plaintiff appealed her transfer to the Defendant Board of Education pursuant to N.C.G.S. § 115C-305 and alleged that the transfer violated her constitutional right to free speech. The Board had a duty to provide Plaintiff with an unbiased forum in which to present her appeal. In that members of the board considered information from outside of the hearing in making their decision, the panel did not provide her with due process as required by the Fourteenth Amendment of the United States Constitution and Article I, § 19 of the North Carolina Constitution.

52. As a proximate result of this violation of her rights, the Plaintiff suffered damages in excess of $10,000, including humiliation and damage to her professional and personal reputation.

THIRD CAUSE OF ACTION

VIOLATION OF LIBERTY INTEREST

53. Plaintiff incorporates by reference paragraphs 1-52.

54. In transferring Plaintiff to a position of lesser status and professional opportunity in violation of her right to freedom of speech, the Defendants have violated her interest in personal liberty, including protection from unconstitutional actions effecting her vocation of choice and damaging her personal and professional reputation. The actions of the Defendants violated her right to liberty as protected by Article I, §§ 1 and 19 of the North Carolina Constitution.

55. As a direct result of the actions of the Defendants, Plaintiff has suffered great emotional harm, personal and professional humiliation and lost professional opportunities. She seeks damages in excess of $10,000.

REQUEST FOR A JURY TRIAL

56. Plaintiff requests a trial before a jury of her peers.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for the following relief from the court:

1. compensatory damages in excess of $10,000 on each of Plaintiff' three claims for relief;

2. reinstatement into a position as a high school drama teacher in the Defendants' school system;

3. the costs of this action, including reasonable attorney's fees awarded pursuant to 42 U.S.C. § 1988; and

4. any other award it deems just and reasonable.

Respectfully submitted, this 10th day of January, 1994.

/s/ S. Luke Largess
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SUPREME COURT, U.S.

No. 97-1835

In The

Supreme Court of the United States

October Term, 1997

MARGARET BORING,

Petitioner,

vs.

THE BUNCOMBE COUNTY BOARD OF EDUCATION, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the First Amendment protect a public secondary school teacher's right to participate in the makeup of the school curriculum through the selection and production of a play?

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STATEMENT OF THE CASE

For the most part, the Respondents agree that the Petitioner's "Statement of the Case" provides an accurate synopsis of the allegations contained in the Amended Complaint under the caption "Factual Background" and an accurate summary of the decisions of the courts below under the caption "Proceedings Below." Rather than recast each element of the Petitioner's Statement of the Case, the Respondents will instead note the following areas of dissatisfaction with that portion of her Petition:

A. Factual Background

- The Petitioner attempts to recast the nature of her claims rather than simply pointing the Court to the specific allegations which are at issue in this Petition. More specifically, the Petitioner alleged in her Amended Complaint only that the Respondents' actions "served to punish and retaliate against her for expressing controversial ideas through the production of the play." App. 87a, ¶ 48.

- The statement that the Petitioner "notified the principal . . . that she had selected *Independence* as the play to be performed in the competition, and he did not object" could be interpreted to mean that she showed the principal the play or told him about its content. App. 2a. The Amended Complaint, however, alleges only that the Petitioner notified her principal as to the name of the play she had chosen. App. 82a.

- The Petitioner fails to mention that in the spring of 1992, the maple stage floor in the school's new auditorium was damaged in the course of preparing the stage for a musical which the Petitioner was producing. App. 3a; 84a-85a, ¶¶ 27-33.

- The Petitioner fails to acknowledge that shortly after the stage floor episode, principal Ivey requested Petitioner's transfer to make room for an additional math teacher due to "personal conflicts resulting from actions [Petitioner] initiated during the course of this school year." App. 3a; 85a, ¶ 35.

- The Petitioner asserts that the play was performed in the state competition "as so modified" by the deletions from the script which principal Ivey required. Pet. 3. The Amended Complaint alleges only that "[t]he students performed the play." App. 83a, ¶ 24. As the spring 1992 incident with stage floor illustrates, it should not be inferred that the Petitioner followed the principal's directions with respect to performance of the play as modified.

- Petitioner's contention that "there was considerable public discussion of the transfer, including accusations that [she] was 'immoral' for having produced the play" is not relevant to the Petitioner's claims or the appropriate Question Presented. Pet. 3. Contrary to the implication of the Petition, there is no allegation that she was transferred to "mollify the opposition by a segment of the community to the ideas expressed in ["Independence".] Pet. 17. The Amended Complaint describes the "public discussion" as "including accusations that the play was obscene and that Boring was immoral," not that she was " 'immoral' for having produced the play." App. 86a, ¶ 43.

B. Proceedings Below

- The Petitioner continues to insist on challenging the rationale of the District Court's decision, which is not at issue before this Court.

- The Petitioner recites in great detail the panel decision of the Fourth Circuit, which was vacated on December 3, 1996 and is not at issue before this Court. App. 5a.

- The Petitioner gives short shrift to the majority opinion which she now asks this Court to review. In particular, she fails to acknowledge the fundamental concept underlying the majority opinion that:

> Someone must fix the curriculum of any school, public or private. In the case of a public school, in our opinion, it is far better public policy, absent a valid statutory directive on the subject, that the makeup of the curriculum be entrusted to the local school board authorities who are in some sense responsible, rather than to the teachers, who would be responsible only to the judges, had they a First Amendment right to participate in the makeup of the curriculum.

App. 13a.

- The Petitioner fails to reference the express language restricting the scope of the Fourth Circuit's decision, noting that, "The only issue in this case is whether a public high school teacher has a First Amendment right to participate in the makeup of the school curriculum through the selection and production of a play." App. 2a. *See also* App. 13a, n.2.

REASONS FOR DENYING THE WRIT

The Petition overstates the scope of the Fourth Circuit's decision and would have this Court review the Fourth Circuit's decision based on unfounded exceptions to well-established First

Amendment principles. Contrary to the assertions in the Petition, the Fourth Circuit's limited holding is consistent with relevant First Amendment jurisprudence as well as sound principles of common sense and public policy.

I.

THE SCOPE OF THE FOURTH CIRCUIT'S DECISION IS APPROPRIATELY LIMITED.

The Petitioner implies that the Fourth Circuit's decision has far reaching implications and limits a wide range of rights under the First Amendment. As noted above, however, the majority opinion clearly limits its application to the specific circumstances addressed in this case, holding that,

> The case does not concern any right a teacher might have to participate in the makeup of the curriculum of a public high school other than the right claimed here under the First Amendment.

App. 13a, n.2. The extent of the Fourth Circuit's decision is expressly limited to the proposition that a public secondary school teacher does not have a First Amendment right to "participate in the makeup of the school curriculum through the selection and production of a play." App. 2a.

The Petitioner contends that the Fourth Circuit's decision is inconsistent with her rights under the First Amendment. The First Amendment, however, provides only that, "Congress shall make no law . . . *abridging* the freedom of speech." U.S. Const., Amdt. 1 (emphasis added). The limited holding of the Fourth Circuit does not "abridge" the rights of teachers to speak out as private citizens. Whether the Petitioner's concern in the present case was with a curriculum which she viewed as overly restrictive or

with the issues of lesbianism and illegitimacy raised in *Independence*, she was as free as any other citizen of the community to express her views, for example in a statement or presentation to the Superintendant or Board of Education about what materials she should be permitted to use.

In this sense, the Fourth Circuit's restriction on a public school teacher's classroom speech is no different from the restrictions on Title X employees established in *Rust v. Sullivan*, 500 U.S. 173 (1991):

> Individuals who are voluntarily employed for a Title X project must perform their duties in accordance with the regulation's restrictions on abortion counseling and referral. The employees remain free, however, to pursue abortion-related activities when they are not acting under the auspices of the Title X project. The regulations, which govern solely the scope of the Title X project's activities, do not in any way restrict the activities of those persons acting as private individuals. The employees' freedom of expression is limited during the time that they actually work for the project; but this limitation is a consequence of their decision to accept employment in a project, the scope of which is permissibly restricted by the funding authority.

500 U.S. at 198-199.

II.

THE FOURTH CIRCUIT'S DECISION IS CONSISTENT WITH BASIC PRINCIPLES GOVERNING A PUBLIC EMPLOYEE'S RIGHTS UNDER THE FIRST AMENDMENT.

1. The majority opinion of the *en banc* court below, as well as Judges Luttig and Wilkinson in their respective concurrences, relied heavily on this Court's decision in *Connick v. Myers*, 461 U.S. 138 (1983), which established a threshold test for determining whether a public employee's speech is entitled to the protection of the First Amendment. Under *Connick*, a public employee's speech is entitled to First Amendment protection only where the employee speaks as a private citizen on a matter of public concern.

As Judge Luttig explained in his concurrence, the *Connick* model provides a useful framework for determining whether the allegations contained in the Petitioner's Amended Complaint even give rise to a claim under the First Amendment, noting that,

> the analogy would seem to be pure between a teacher who, *qua* teacher, attempts to assert her own views through the curriculum itself, and any other public employee who, *qua* employee, attempts to assert her personal views through the official policies and decision of her office.

App. 16a. The Petitioner's alleged expression of unpopular views through curricular materials of her own choice therefore did not satisfy the threshold test under *Connick* and was not entitled to First Amendment protection.

2. The Petitioner's position, like that of the dissenters in the Fourth Circuit, rests on the erroneous assumption — contrary to

Connick — that anything she said in the context of a classroom was entitled to some degree of First Amendment protection merely because it satisfied a colloquial definition of being a matter of "public concern." This Court has never recognized such an exception to the threshold requirement of *Connick* based solely on the nature of the employee's position. If this assumption were accurate, then every public employee whose position necessarily entails matters of general interest to the public would be entitled to First Amendment protection for all speech in the context of her job, an outcome which would fly directly in the face of *Connick's* threshold test.

The Petitioner mistakenly relies on the broad language of dicta from *Keyishian v. Board of Regents*, 385 U.S. 589 (1967) as support for the proposition implicit in her Petition that teachers are entitled to greater First Amendment protection than other public employees. In *Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991), the Eleventh Circuit put *Keyishian*'s dicta in perspective:

> *Keyishian* dealt with that brand of regulation most offensive to a free society: loyalty oaths. The pronouncement about academic freedom in that context, however, cannot be extrapolated to deny schools command of their own courses. . . . Though we are mindful of the invaluable role academic freedom plays in our public schools, particularly at the post-secondary level, we do not find support to conclude that academic freedom is an independent First Amendment right. And, in any event, we cannot supplant our discretion for that of the University. Federal Judges should not be ersatz deans or educators.

926 F.2d at 1075.

Even Justice Brennan, who authored the oft-cited dicta in *Keyishian*, later acknowledged the significance of the distinction between the university context (as in *Keyishian*) and public secondary schools, noting that:

> The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure.[5]
>
> [5] The potential for undue influence is far less significant with regard to college students who voluntarily enroll in courses.

Edwards v. Aguillard, 482 U.S. 578, 584; 584, n.5 (1987).

Justice Brennan further indicated in *Edwards* that his sweeping rhetoric regarding "academic freedom" would not apply in the secondary school context, explaining that:

> [I]n the State of Louisiana, courses in public schools are prescribed by the State Board of Education and teachers are not free, absent permission, to teach courses different from what is required. [citation to record omitted] "Academic freedom," at least as it is commonly understood, is not a relevant concept in this context.

Id. at 586, n.6.

3. If a distinction may be drawn between the First Amendment rights of public secondary school teachers and other public employees at all, secondary school teachers are subject to greater restrictions. For example, in *Bethel School District v. Fraser*, 478 U.S. 675 (1986), this Court held:

> Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse. . . . Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions. The inculcation of these values is truly the "work of the schools." [citations omitted] The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board.

Id. at 682-683.

Similarly, in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), this Court held:

> Educators are entitled to exercise greater control . . . over . . . expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school . . . to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school.

Id. at 273.

In subjecting the Petitioner to at least the same limitations on First Amendment protection as other public employees, the Fourth Circuit' decision is therefore consistent with established law.

4. The Petitioner contends that this case is similar in some respects to *Board of Education v. Pico*, 457 U.S. 853 (1982). The plurality decision in *Pico*, however, by its own terms does

not apply to the question before the Court in this case. The plurality in *Pico* specifically held that:

> [A]s this case is presented to us, it does not involve textbooks, or indeed any books that Island Tree students would be required to read. [footnote omitted] Respondents do not seek in this Court to impose limitations upon their school Board's discretion to prescribe the curricula of the Island Trees schools. On the contrary, the only books at issue in this case are *library* books, books that by their nature are optional rather than required reading. Our adjudication of the present case thus does not intrude into the classroom, or into the compulsory courses taught there.

457 U.S. at 861-862 (emphasis in original.)

To the extent the *Pico* decision even addresses the issue of a school board's discretion to control the curriculum in a public secondary school, it is consistent with the Fourth Circuit's decision in this case. Contrasting the board's discretion to control the curriculum with the discretion to remove books from the library, this Court held:

> Petitioners might well defend their claim of absolute discretion in matters of *curriculum* by reliance upon their duty to inculcate community values. But we think that petitioners' reliance upon that duty is misplaced where, as here, they attempt to extend their claim of absolute discretion beyond the compulsory environment of the classroom. . . .

Id. at 869 (emphasis in original.)

5. The Petitioner acknowledges that recent decisions of this Court establish that where the government itself is the speaker, it may determine what the message shall or shall not be. *See Rust*; *Rosenberger v. Rector & Visitors*, 515 U.S. 819 (1995); *National Endowment of the Arts v. Finley*, __ U.S. __ (June 25, 1998). Pet.15. The Petitioner suggests that this principle may not apply to the context of public education, but with regard to a public university this Court specifically concluded in *Rosenberger* that:

> When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message.

515 U.S. at 833. Similarly, when a public school teacher presents "the content of the education" which the school provides, it is the school speaking, and the local board of education may regulate the content of what is or is not expressed. The limited holding of the Fourth Circuit that the First Amendment did not protect the Petitioner's right to select the curriculum was merely another way of stating the principle articulated in *Rust* and reaffirmed in *Rosenberger*.

The principles of *Rust* and *Rosenberger* work hand-in-hand with the threshold test in *Connick* as set forth above. More specifically, where a public employee's speech represents the speech of the governmental employer, it necessarily follows that it is not speech in her capacity as a private citizen on a matter of public concern. It therefore does not satisfy the threshold requirement of *Connick* and is not protected by the First Amendment.

III.

THE FOURTH CIRCUIT PROPERLY DECLINED TO ADDRESS THE PETITIONER'S CONTENTION THAT THE FIRST AMENDMENT GUARANTEED "NOTICE" THAT HER SPEECH WAS PROSCRIBED.

The petitioner submits that the decision of the court below rules out any requirement of fair notice where what she contends is "speech" involving the curriculum is concerned, calling into question the application of *Keyishian*. This position overstates both the holding of the Fourth Circuit, and, as noted above, the significance of *Keyishian*. The Fourth Circuit did not even address the merits of the Petitioner's contention that the First Amendment, at least as it pertains to teachers, includes a requirement of notice as to precisely what speech is prohibited. Instead, it merely noted that,

> Plaintiff's contention that she was not given notice as to what was being proscribed is, of course, without merit, the plaintiff having no First Amendment right to participate in the makeup of the curriculum.

App. 13a. This logical conclusion hardly calls into doubt any established principles of constitutional jurisprudence. The Petitioner's contention puts the proverbial cart before the horse, seeking to impose a requirement of notice under the First Amendment to protect a public employee from the potential consequences of expression which the First Amendment does not even protect.[1]

---

1. The only claim preserved in the Petitioner's appeal was her free speech claim under the First Amendment. As alleged in the Amended Complaint, this claim is based solely on the defendants' alleged retaliation against her for the expression of "controversial ideas" through the production of the play. The Petitioner might now (Cont'd)

CONCLUSION

For above-stated reasons, the Court should deny the Petition for Certiorari.

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contend that she has alleged facts sufficient to form the basis of a claim for insufficient notice; however, even *Ward v. Hickey*, 996 F.2d 448 (1st Cir. 1993), on which the petitioner relies at p.17 of her Petition, reveals that an inadequate notice claim must be pled separately. The Petitioner has already amended her Complaint once in this case and still failed to include a claim of inadequate notice. Further, the Petitioner initially alleged a due process claim, but she did not appeal the dismissal of that claim.

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No. 97-1835

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

MARGARET BORING,
Petitioner,
v.
THE BUNCOMBE COUNTY BOARD OF EDUCATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

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REPLY BRIEF FOR PETITIONER

ARGUMENT

Like school districts throughout the country, respondent Buncombe County Board of Education sets the general curriculum for its schools and prescribes certain implementing curricular materials. At the same time—and again like districts throughout the country—the Board calls upon its teachers, through the exercise of their professional judgment, to select additional curricular materials.

In the case of plaintiff Margaret Boring, the Board called on Ms. Boring to select a play to be presented by her advanced drama class in a statewide competition held each year. School officials did not tell Boring what play to select; it was her responsibility to choose a play, and then to notify her principal of the selection she had made. App. 81a-82a.

The question presented by this case is whether, having called upon Boring to determine what play would be produced by her students, school officials had absolute authority to discipline her after the fact because of objections to controversial ideas expressed in the play, regardless of the reasons for the objections and despite the fact that Boring had been given no notice whatsoever that her selection of the play might subject her to discipline.

1. The question so presented is an important one—not only for teachers, but for students and all who have a stake in the public schools.

If, as the Fourth Circuit held by a 7-6 vote, teachers may be disciplined on ideological grounds for their selection of instructional materials, without notice and regardless of the reasons motivating the school officials, the result will be "a highly efficient *in terrorem* mechanism." *Keyishian v. Board of Regents,* 385 U.S. 589, 601 (1967).

Far from effectuating legitimate pedagogical decisions of school officials, this will cause teachers to "steer far wider," *id.* at 604, of anything that might be deemed controversial by any segment of the community. The result will be a stifling of that " 'free play of the spirit all teachers ought especially to cultivate and practice,' " *id.* at 601 (quoting *Wieman v. Updegraff,* 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring)), and a concomitant dilution of the content of the education that public school students will receive.

Unable to mount any convincing argument that the question presented by the decision below does not warrant review by this Court, respondents seek to reduce the issue to a trivial proposition that we agree would admit only of the answer respondents propose. To that end, respondents attempt to reframe the issue in a manner that simply ignores the crucial points that divided the court below.

Seizing on language from Judge Widener's opinion that obscures the critical aspects of the Fourth Circuit's ruling, respondents assert that the case turns on whether the First Amendment gives a teacher the "right to participate in the makeup of the school curriculum." Brief in Opposition ("Opp.") i, 3, 4. But that is not what this case is about: the six dissenting members of the en banc court agreed that "school administrators must 'be permitted to have the final say in setting the appropriate curriculum so that students are not exposed to material that detracts from or impedes the school's pedagogical mission.'" App. 32a (Motz, J., dissenting from the decision en banc) (quoting panel opinion). As they quite rightly recognized, Boring's claims are entirely consistent with that proposition.

This case was decided on a motion to dismiss, and the allegations of the complaint are *not* that Boring sought to supplant the authority of school officials to determine curriculum. Rather, the complaint alleges (i) that Boring carried out her responsibility to select a play and to inform her principal of the play she selected, and then proceeded to produce the play only after the prineipal voiced no objection;[1] (ii) that Boring complied with both the letter and spirit of the school's policy regarding the use of controversial materials in the curriculum;[2] and (iii) that the school officials, "act[ing] . . . with malice toward plaintiff over the ideas expressed in the play," subsequently decided to "punish and retaliate against her for expressing controversial ideas through the production of the play," amidst unfounded accusations from some members of the community "that the play was obscene and that Boring was immoral."[3]

---

[1] App. 81a-82a, ¶¶ 13-15. When one parent (of a student who was not in Boring's class) subsequently objected to the play, the play was performed in the state competition only after the principal gave his express consent. App. 83a, ¶¶ 23-24.

[2] App. 82a, ¶ 16; App. 83a, ¶ 23; App. 85a, ¶¶ 37-39.

[3] App. 85a, ¶¶ 35, 37; App. 86a, ¶ 43; App. 87a, ¶ 48. Of course, these allegations—along with all facts favorable to the plaintiff that

There is nothing "limited," Opp. 4, about the Fourth Circuit's holding that those allegations fail to state a First Amendment claim.

Every day teachers are called upon to do what Margaret Boring did in this case: to select teaching materials in circumstances where school officials and school policies have not specified what materials should be used. The Fourth Circuit's decision stands unequivocally for the proposition that, whenever a member of the community or of the school administration objects after the fact to ideas expressed in materials so selected by a teacher, the First Amendment affords the teacher no protection against being disciplined for having selected those materials—no matter what may be the reason for the objections, and regardless of whether the teacher had any notice, through school policies or otherwise, that the materials she selected might subject her to discipline.[4]

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could be proved consistent with the allegations—must be taken as true in passing on the motion to dismiss. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

[4] Respondents' suggestion that Boring has somehow waived her argument that she lacked reasonable notice, Opp. 12-13 n.1, is without merit. There was no waiver, nor did the Fourth Circuit suggest that there was. The premise of respondents' contention is that Boring did not "ple[a]d separately . . . an inadequate notice claim." Opp. 12-13 n.1. However, it is hornbook law, followed in every circuit, that the Federal Rules of Civil Procedure require only that a plaintiff plead the pertinent *facts* giving rise to her claims; *legal theories* need not be pleaded. *See* 5 C. Wright & A. Miller, Federal Practice & Procedure 1219 (1990) ("it [is] very plain that the theory-of-the-pleadings mentality has no place under federal practice"); *id.*, nn. 7, 12, 13, 17 (collecting cases). Here, the complaint plainly alleges facts establishing lack of notice, and the district court recognized that this was central to Boring's First Amendment claim. App. 73a.

What is more, in both courts below, Boring briefed extensively the notice aspect of her First Amendment claim. Although the Fourth Circuit noted that Boring had not appealed the dismissal

That holding has profound implications for the exchange of ideas—and the quality of education—in the nation's public schools; and it presents an important constitutional question that warrants this Court's review.

2. Nor is that all: the question presented here is one as to which there is a conflict among the circuits and state courts of last resort. *See* Pet. 9-12 (citing decisions of the First, Second, Fifth and Sixth Circuits and the highest courts of Massachusetts, Alaska, Colorado and California).

Respondents do not even attempt to deny this conflict; the Brief in Opposition is silent on the point.[5]

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of her separate *due process* claim, *see* App. 14a n.3, the court recognized that the notice issue was squarely before the court as a facet of Boring's First Amendment claim. App. 13a n.2. The court below decided the merits of that claim, including specifically the lack-of-notice component. *Id.*

Ward v. Hickey, 996 F.2d 448 (1st Cir. 1993), cited at Opp. 13 n.1, is not at all on point. The *Ward* court did not hold that the plaintiff waived her notice claim by failing to plead it as a separate legal theory; the court simply held that the plaintiff failed to request that the issue of notice be submitted *to the jury*. *See* 996 F.2d at 454-55.

[5] The Brief in Opposition cites but one lower court decision. *See* Opp. 7, quoting *Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991). Even that decision is inconsistent with the Fourth Circuit's analysis. Far from suggesting that a teacher's speech involving curricular matters is categorically unprotected, the Eleventh Circuit stated in *Bishop* that, in determining "to what degree a school may control classroom instruction before touching the First Amendment rights of a teachers . . ., 'we see no substitute for a case-by-case inquiry into whether the legitimate interests of the authorities are demonstrably sufficient to circumscribe a teacher's speech.'" 926 F.2d at 1073-74 (quoting *Mailloux v. Kiley*, 448 F.2d 1242, 1243 (1st Cir. 1971)). The issue in *Bishop* was whether the plaintiff professor had a First Amendment right to interject his personal religious views into the classes he taught at a public university. Even on those allegations, the *Bishop* court did not hold that the plaintiff professor had failed to state a claim. And, although the court held that the defendant university was entitled to summary

3. Contrary to respondents' contentions, this Court has never directly addressed the question presented here, but the decisions of this Court that are most closely on point suggest strongly that the Court below erred.

a. This Court has recognized that school officials are not free to act "simply because they dislike the ideas contained in [a] book[ ]"; rather, their actions must be motivated by concerns for "educational suitability." *Board of Education v. Pico,* 457 U.S. 853, 871-73 (1982) (opinion of Brennan, J.). *See* Pet. 13 and n.3 (summarizing the other opinions in *Pico*). The Court also has held that, even as to matters that "may fairly be characterized as part of the school curriculum," actions of school officials that restrict speech violate the First Amendment if they are not "reasonably related to legitimate pedagogical concerns." *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 271, 273 (1988). And, the Court has declared that "[t]he danger of a chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform teachers what is being proscribed." *Keyishian*, 385 U.S. at 604.

Although we have been frank to acknowledge that neither these nor other decisions of this Court settle the question presented here, *see* Pet. 12-18, they point strongly against the notion that school officials' authority on questions relating to the curriculum is so unlimited as to leave teachers without any First Amendment protection when they are disciplined, *without notice and without any legitimate reason,* for their selection of teaching materials.

b. Respondents' contention that decisions of this Court have resolved this question in their favor cannot with-

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judgment, it did so only after determining from record evidence that the university had a compelling interest in prohibiting the introduction of personal religious views into classroom instruction. *See* 926 F.2d at 1068-80, 1074-77. Furthermore, *Bishop* did not involve any issue of lack of notice.

stand analysis. Respondents endorse Judge Luttig's view that the "public concern" test of *Connick v. Myers*, 461 U.S. 138 (1983), can never be met where a public employee's speech was undertaken as part of his or her job. *See* Opp. 6. And respondents would draw the same conclusion from the discussions in *Rust v. Sullivan*, 500 U.S. 173 (1991), and *Rosenberger v. Rector & Visitors*, 515 U.S. 819 (1995), regarding the government's general authority to determine the content of speech that is made on its behalf. *See* Opp. 5, 11. However, respondents read into *Connick*, *Rust* and *Rosenberger* far more than this Court decided in those cases.

Connick did not hold that an individual's speech "as an employee" is unprotected in all circumstances: the Court's holding was confined to speech involving "matters *only of personal interest*," such as a mere "employee grievance." 461 U.S. at 147, 154 (emphasis added). This is not such a case. *See* App. 29a-32a (Motz, J., dissenting from the decision en banc).

As for *Rust* and *Rosenberger*, this Court's decision in *Pico* shows how problematic it is to suggest that the government's role as the provider of public educational programs (in *Pico*, school libraries) is one that may be exercised without regard to First Amendment interests.

In all events, this Court has not yet considered how the principles adumbrated in *Rust* and *Rosenberger* should be given proper effect in a case where the government has disciplined an employee for expressive activities that are undertaken as part of the employee's job. Respondents' contention that *Rust* and *Rosenberger* dictate the conclusion that teachers and other public employees have no First Amendment rights in this setting cannot be reconciled with the numerous decisions we have cited that are in conflict with the Fourth Circuit's holding. *See* Pet. 9-10. *See also Moore v. City of Wynnewood*, 57 F.3d 924, 933 (10th Cir. 1995) ("An employee's speech is not exempted from First Amendment protection just be-

cause it occurred on the job or as part of an employee's official functions.").[6] There simply is nothing in *Rust* or *Rosenberger* to suggest that the government's general authority to determine the content of speech it funds gives the government *carte blanche* to discipline a teacher —or, for that matter, any employee—for having engaged in speech *that the employee could not reasonably have thought was prohibited.* In fact, *Rust* suggests the opposite. *See Rust,* 500 U.S. at 200 (discussing *Keyishian*).

The uncertainties that attend the application of *Connick, Rust* and *Rosenberger* in this context are a compelling reason to *grant* certiorari, not to deny it.

Respondents' reliance on other decisions of this Court is even more tenuous. Respondents make much of language that appears in *Edwards v. Aguillard,* 482 U.S. 578, 584 n.6 (1987). *See* Opp. 8. But, in the passages to which respondents refer, the Court merely noted in dictum that " '[a]cademic freedom,' at least as it is commonly understood," does not give a teacher a right "to teach courses different from what is required." We fully accept that proposition, as did the six dissenters below, but it does not begin to decide this case.

Nor is respondents' position advanced by the passage from *Hazelwood* that is quoted in the Brief in Opposition

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[6] Respondents' assertion that the law is clear as to the implications of *Rust* and *Rosenberger* for public employment is also belied by the multiplicity of opinions in *Yniguez v. Arizonans for Official English,* 69 F.3d 920 (9th Cir. 1995) (*en banc*), *vacated on other grounds,* 520 U.S. 43 (1997), which grapple with one aspect of this subject. *See* 69 F.3d at 939-941 (opinion of the court); *id.* at 951-52 (Brunetti, J., concurring); *id.* at 953-54 (Reinhardt, J., concurring); *id.* at 954-58 (Fernandez, J., dissenting); *id.* at 960 (Wallace, J., dissenting); *id.* at 960-63 (Kozinski, J., dissenting). *See also Ruiz v. Hull,* 957 P.2d 984, 997-98 (Ariz. 1998) (holding that to prohibit public employees from speaking in a language other than English when performing governmental functions violates the employees' First Amendment rights).

at 9. The Court there referred to the authority of "[e]ducators . . . to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school." 484 U.S. at 271. What the complaint in this case alleges is that respondents did *not* act on the basis of such reasonable pedagogical interests when they disciplined Margaret Boring, but rather that they acted out of animosity toward ideas expressed in the play she selected, despite the fact that she had been given no reason to think that her selection of the play was not in conformance with school policies.

Neither *Hazelwood* nor any other decision of this Court supports the conclusion that such allegations fail to state a First Amendment claim, and the decision below so holding conflicts with the decisions of several circuits and state courts of last resort. The case therefore warrants review by this Court.

CONCLUSION

For the foregoing reasons and the reasons stated in the petition, this Court should grant the petition for certiorari.

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